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Supreme Court of the United States

BALL ENGINEERING COMPANY,
Petitioner,

vs.

J. G. WHITE & COMPANY, INC.,
Respondent.

OCT. TERM, 1918.

No. 227.

Brief on Behalf of Respondent.

This is an action brought in May, 1911, in the United States District Court for the District of Connecticut by the Ball Engineering Company, a Missouri corporation, against J. G. White & Company, Inc., a Connecticut corporation, for damages for the alleged conversion of a contractor's plant and equipment, consisting of bunk-houses, kitchen and commissary building, office building, material house, cement shed, dining-room and mess hall, two steam boilers, two derricks or pile drivers, three hoisting engines, two dump concrete buckets, one orange-peel bucket, twenty dump cars, one concrete mixer, three pumps, a lot of steam pipe and tramway rails, and including also some construction material consisting of round piles and sheet-piling, all of which equipment and material were prepared for use or in use in the prosecution of the work of constructing lock and dam No. 6, on the Trinity River, in the State of Texas, and all of which, including the buildings, were located upon the site of said lock and dam at the time of the alleged conversion.

Statement of the Case.

The finding of facts (designated in the Record as "Report of the Committee," and adopted by the District Court as its finding of facts) discloses the following:

P. D. C. Ball, who is the president and practically the sole stockholder of the petitioner, and George A. Carden were partners from about the year 1905, until April or May, 1909, the name of the firm being "Ball-Carden Company," and they were engaged, both as partners and also upon their individual accounts, in the contracting business in the State of Texas. This partnership purchased the contractor's equipment and materials involved in this suit, and during the twelve months prior to September, 1909, said partnership placed said equipment and materials on the site of said lock and dam, and built the said bunk-houses and other buildings for use in the performance of the government contract hereinafter mentioned, under which contract the said lock and dam No. 6 was, at that time, being built (Record, pp. 14 and 15; Findings Nos. 5 and 7).

On July 10th, 1906, the United States entered into a contract with the Hubbard Building & Realty Company, for the construction of said lock and dam No. 6 (Record, p. 14; Finding No. 4).

The said George A. Carden became the president of the Hubbard Building & Realty Company some time prior to December 7th, 1907, and continuously held said position until after September 8th, 1909, and on August 21st, 1908, the work upon said lock and dam No. 6, not having progressed as rapidly as required by the terms of the contract, he, as president of said corporation, applied for and obtained from the United States Engineer Officer in charge of said work, an extension of time for its completion until eight months from September 1st, 1908, and on May 29th, 1909, he, as president of said corporation, made a further request

for an additional extension of time which was also granted by said Engineer (Record, pp. 14, 15 and 16; Findings Nos. 6 and 12).

The said plant and equipment, buildings and materials, were used by the said P. D. C. Ball and George A. Carden, as partners in the construction of said lock and dam No. 6, until on or about the month of May, 1909, at which time said partnership was dissolved (Record, pp. 14 and 15; Findings Nos. 5 and 7).

Upon the dissolution of said partnership, the work of constructing said lock and dam No. 6, was assumed by the said P. D. C. Ball, who continued said work, operating under the name of "Ball Engineering Company," and using for that purpose the said equipment, machinery, buildings and materials, until on or about September 8th, 1909, when he discontinued said work, left all of said property upon the Government Reservation at the site of the said lock and dam, and did not thereafter resume the work of constructing said lock and dam (Record, pp. 15 and 61; Finding No. 8, and Defendant's Exhibit 23).*

On or about July 24th, 1909, the said George A. Carden executed and delivered to the said P. D. C. Ball a bill of sale, whereby for the consideration of one dollar and for other good and valuable consideration, the said George A. Carden sold to the said P. D. C. Ball all of the right, title and interest of the said George A. Carden, in and to all of the personal property of every kind and description, belonging to the partnership of Ball-Carden Company, "used in connection with or located at or near lock and dam No. 6," which included the property involved in this case (Record, pp. 15 and 23; Finding No. 7, and Plaintiff's Exhibit "A".)

On dates beginning January 4th, 1909, and ending September 8th, 1909, ten checks were issued and signed by A.

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*Reference to Exhibits are limited to such as are incorporated by reference thereto in the Findings.

E. Waldron, Captain, Corps Engineer, U. S. A., all payable to the order of the nominal contractor, the said Hubbard Building & Realty Company, in payment of the monthly estimates or vouchers issued by said Engineer for work performed under the contract for constructing said lock and dam No. 6, by Ball-Carden Company or by P. D. C. Ball, and all of said checks are endorsed as follows: "Hubbard Building & Realty Company, by George A. Carden, President," and under said endorsement appears the endorsement, "P. D. C. Ball." Each of said checks bears on its face a statement showing that it had been issued in payment for work done upon the construction of said lock and dam No. 6, and the proceeds of all of said checks were received by the said P. D. C. Ball (Record, p. 16; Finding No. 12).

While the said lock and dam No. 6 on the Trinity River was being constructed by the said P. D. C. Ball and George A. Carden as partners and later by P. D. C. Ball upon his own account, he, the said P. D. C. Ball, also was constructing on his own account locks and dams Nos. 2 and 4, being a portion of the same general project for the improvement of the navigation of said river (Record, pp. 16 and 17; Finding No. 13).

A certain Oscar Shanks was the general superintendent of the said P. D. C. Ball, upon the work of constructing the said locks and dams Nos. 2 and 4; and from June 1st, 1909, which was after the said P. D. C. Ball had taken over the work of constructing the said lock and dam No. 6, upon the dissolution of the aforesaid partnership, existing between himself and the said George A. Carden, Mr. Shanks became his general supjerintendent in charge of the work of constructing said lock and dam No. 6, and continued to act in such capacity until the said P. D. C. Ball abandoned the work of constructing said last-mentioned dam, which was on September 8th, 1909 (Record, pp. 15, 16 and 17; Findings Nos. 9 and 13).

The said Oscar Shanks was familiar with the terms of the contract and specifications under which the work of constructing said lock and dam No. 6 was being performed by the said P. D. C. Ball, and had the contract and specifications in his possession, they having been turned over to him by his predecessor, and he, from time to time, discussed them with Captain A. E. Waldron, the Government engineer officer in charge of the work, and said Shanks carried on said work under the direction of the said P. D. C. Ball (Record, pp. 15 and 16; Finding No. 10).

The said P. D. C. Ball quit work upon said lock and dam No. 6 on the day when he received the last one of the monthly checks covering payment for work done thereon, and which, as has been stated, were made payable to the nominal contractor, but endorsed over to him by his partner, the said George A. Cardon, who was also the president of the nominal contractor. The last of these checks bears date the 8th day of pp. 15 and 16; Findings 9 and 12).

It does not appear from the findings under what circumstances the partnership of Ball-Carden Company and later the said P. D. C. Ball, operating under the name of "Ball Engineering Company," undertook the performance of the contract between the Government and the Hubbard Building & Realty Company, but it does appear, and is not denied, that they purchased and placed upon the Government Reservation at the site of the said lock and dam No. 6 all of the property involved in this case, and employed and used it in doing the work which the Hubbard Building & Realty Company was nominally bound by the contract to perform, and that beginning with January 4th, 1909, the said P. D. C. Ball received all of the payments made by the Government on account of work done upon said lock and dam, all of said work having been performed by the partnership until its dissolution in April or May, 1909, and by the said P. D. C.

Ball thereafter until he abandoned it on September 8th, 1909 (Record, pp. 15, 16 and 17; Findings 8, 9, 12 and 14).

The work having been abandoned by the said P. D. C. Ball, as aforesaid, the Engineer Officer in charge for the Government, on October 22nd, 1909, gave notice, pursuant to the provisions of the contract, of its annulment (Record, pp. 16 and 35; Finding 11, and Defendant's Exhibit No. 17).

All of the property involved in this case remained on the Government Reservation at the site of said lock and dam No. 6 after the said P. D. C. Ball had abandoned the work, and on March 16, 1910, he addressed to the Engineer Officer in charge for the Government a letter in which he claimed that the boilers, engines, pile drivers, cars, tracks, cement, lumber, piles and iron were his personal property and that as they could be used to advantage by him in his work upon locks and dams Nos. 2 and 4 he requested information as to the theory on which the Government "refuses to turn over this property to him." The buildings and other property involved in the case he at no time, prior to the institution of this suit, made any claim for. He repeated his aforesaid claim and demand in another letter dated April 16th, 1909 (Record, pp. 17, 54 and 55; finding 16, and Defendant's Exhibits 5 and 6).

These letters of the said P. D. C. Ball were submitted by the Engineer Officer in charge of the work to the Chief of Engineers of the U. S. Army, who directed the Engineer Officer in charge of the work to notify the claimant of the property, and other persons interested

> "that the Department is proceeding on the assumption that the title to the property is in the Hubbard Building & Realty Company, the contractor for the construction of lock 6 and that the United States has the right, under paragraph 33 of the specifications forming part of the contract, to take possession of all or any part thereof; * * * that it is not yet certain whether or not the United States will elect to exercise this right; * * * that the United States does not recognize Mr. Ball in

this matter *except as the representative or agent of the contractor, the Hubbard Building & Realty Company;* * * * and that if efforts are made, through action in the courts, or otherwise, to remove the property, this office should be promptly advised, in order that the Department of Justice may be requested to instruct the United States District Attorney to take charge of the defense." (Italics are ours.)

A copy of the instructions of the Chief of Engineers, U. S. A., to the Engineer Officer in charge of the work was delivered by him to Mr. Ball on April 28th, 1910 (Record, 66. 17, 55 and 56; Finding No. 16, and Defendant's Exhibit No. 18).

Pursuant to advertisement dated April 30th, 1910, a contract for the completion of the work of constructing said lock and dam No. 6 was awarded by the Government to the J. G. White Company, Inc., the respondent. This contract bears date May 18th, 1910, and was approved by the Chief of Engineers, U. S. A., on June 6th, 1910 (Record, pp. 17 and 37; Finding 15, and Defendant's Exhibit No. 21).

On June 6th, 1910, a question having been raised by the said P. D. C. Ball as to the right of the respondent to use the contractor's equipment and materials left by him upon the Reservation, the Engineer Officer in charge of the work notified the respondent by letter that

> *"the fact that the material and machinery is on the Government Reservation* or in the near vicinity thereof, and the circumstances under which this office has not permitted its removal from the lock site, *is sufficient to assume that the Government has taken possession of the items you speak of at the present time. They are therefore turned over to you under the conditions contained in Insert E, following paragraph* 38 *of the specifications for the construction of lock and dam No. 6, Trinity River, Texas, for use in further work on lock and dam No. 6, Trinity River, Texas."* (Italics are ours.) (Record, p. 18; Finding No. 18.)

On the same day; that is, on June 6th, 1910, the Engineer Officer in charge of the work notified both the "Ball Engineering Company", that is, Mr. Ball (for he had not yet caused his business to be incorporated), and Mr. Carden, president of the Hubbard Building & Realty Company, of his action in taking possession of the buildings, plant, equipment and material "formerly used in the prosecution of your contract (now annulled) for the construction of said lock and dam No. 6". His letter giving said notice contains the following statement:

> "The detailed list of plant, equipment, material and buildings required is as follows."

Then follows a list of the property taken over by the Government, and a statement that such property had been taken possession of under the provisions of paragraph 33 of the original specifications, and the concluding paragraph of the letter calls upon the original contractor to remove

> "such other property and materials as you have at lock and dam No. 6, Trinity River, Texas, not listed above * * * or give notice of its abandonment within the next thirty days." (Record, pp. 17, 58, 59, 60 and 61; Finding No. 17 and Defendant's Exhibit No. 22.)

Mr. Ball replied to the above notice of June 6th, 1910, on June 8th, 1910, stating that the property belonged to him personally, and on June 9th, 1910, a letter was written to him by the assistant to Captain Waldron, Corps of Engineers, U. S. A. (who was the Engineer Officer in charge of the work), stating that notwithstanding the assertion by Mr. Ball that the property in question belonged to him personally, any attempt to remove any of the property that had been listed in Captain Waldron's notice of June 6, 1910,

> *"will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract."* (Record, pp. 17, 62, 63 and 64; Finding No. 17, and Defendant's Exhibit No. 24.)

On June 22, 1910, the Engineer Officer in charge of the work notified the J. G. White & Company, Inc., the respondent, that he had determined that $380 per month was a fair rental to be paid by said respondent to the Government for the buildings and machinery that had been taken possession of by the Government and that such rental should be paid to the Government therefor and that he had also fixed valuations upon the materials at the lock site and that the respondent could take such of them as it deemed proper at such valuations, respectively (Record, p. 18; Finding 19).

On July 18th, 1910, the respondent receipted to the United States for the buildings and machinery and for such of the materials as it was willing to and did receive. In forwarding the receipt forms to the respondent for its signature, Captain Waldron said in his letter of June 22, 1910:

> "Referring to the property recently seized by the Government at lock and dam No. 6, Trinity River, Texas, and turned over to you, I enclose herewith memorandum invoice for same * * * If you wish to make any change as to the number of articles you receive (as for instance in the round piles and the sheet piling), please take the matter up in detail with Mr. Erhardt." (Record, pp. 18 and 64; Finding Nos. 21, 22, and Defendant's Exhibit No. 25.)

On August 5, 1910, the Engineer Officer in charge of the work notified P. D. C. Ball and the Hubbard Building & Realty Company that the respondent had taken certain of the materials seized by the Government; that the total valuation, assessed by him, upon the materials taken by it and incorporated in the work was $2,640.96; and the said P. D. C. Ball and Hubbard Building & Realty Company were further notified by him to remove the balance of the materials within thirty days (Record, p. 18; Finding No. 22).

The respondent completed the work of constructing the said lock and dam No. 6; paid to the Government the rental

of the buildings, plant, equipment and machinery as determined by the Engineer Officer in charge of the work, which was at the rate of $380 per month for the months of July, August, September, October and until November 15, 1910, and thereafter, at the rate of $310 per month until the work was finished and accepted by the Government during January, 1911. The occasion for the reduction of the rental was the surrender by the respondent, on November 15, 1910, of two of the hoisting engines, three of the pumps and one of the dump-buckets, to the Government. In addition to the rentals paid to the Government by the respondent for the use of the buildings, etc., it paid the Government the sum of $2,640.96 for the materials turned over to it and incorporated in the work (Record, pp. 18, 19 and 67; Finding No. 24, and Plaintiff's Exhibit D).

On or before the completion of the lock and dam the respondent returned to the Government all of the property involved in this case, other than the materials which had been turned over to it by the Government to be incorporated in the work and which were so incorporated, and for which materials it paid to the Government the sum of $2,640.96, as aforesaid, and all of said property other than said materials incorporated in the work were tendered by the Government to the said Hubbard Building & Realty Company and to said Ball, neither of whom accepted said property (Record, p. 19; Finding No. 25).

After the return of said property by the respondent to the Government the said property remained at the site of the said lock and dam No. 6 in the possession of the Government (Record, p. 20; Finding No. 31).

On January 30, 1911, which was after the said lock and dam No. 6 had been completed and accepted, the said Engineer Officer in charge of the work notified the said George A. Carden, president of the Hubbard Building & Realty Company, that he could take and remove said property from

the lock site provided he did so by February 28, 1911, and that his failure to remove it would be taken as indication of his intention to abandon same, but this notice was withdrawn on February 3, 1911, upon a telegraphic order to said Engineer Officer from General Bixby, Chief of Engineers, U. S. A. (Record, pp. 19, 68, 69, 70; Findings Nos. 27, 28, 29; Plaintiff's Exhibit E, and Defendant's Exhibits 30 and 32).

On the same day, that is, February 3, 1911, the said Engineer Officer in charge of the work ordered the United States Inspector under him to allow no claimant of the said property to take possession of any part of it (Record, pp. 19 and 20; Finding No. 30).

On or about April 2, 1910, the petitioner, the Ball Engineering Company, was incorporated under the laws of the State of Missouri with a capital stock of $50,000.00, divided into five hundred shares, four hundred and ninety-eight of which were issued to and are held by the said P. D. C. Ball, the consideration for the issuance of said stock being the sale and delivery by the said P. D. C. Ball to his said corporation of a large quantity of contractor's plant, equipment and machinery located at various places in the State of Texas, of which the property in controversy in this case constitutes but a small portion. Ever since the incorporation of the petitioner, the Ball Engineering Company, the said P. D. C. Ball has been its president, one of its directors and the holder and owner of four hundred and ninety-eight out of the total issue of five hundred shares of its capital stock (Record, p. 14; Finding No. 3).

ARGUMENT.

I.

The Taking of the Property of the Petitioner's Assignor by the Officers of the United States was a Valid Exercise of the Sovereign Power of Eminent Domain Possessed by the Government, Subject to Which All Private Property is Held.

The improvement of the navigation of the Trinity River was authorized by Act of Congress, approved March 3rd, 1905, (33 Stat. 1131) and by subsequent Acts appropriating funds for the purpose of acquiring the necessary property and providing for the cost of the necessary structures.

It has been held in connection with similar improvements authorized by the same Appropriation Act of March 3rd, 1905, and by other similar Acts, that the authority of the Government to take private property needed by it in making such improvements is not confined to such Acts, but that the Act of April 24, 1888, Ch. 194, 25 Stat. 94 (U. S. Comp. St. 1901, p. 3325), confers upon the Government the right to take

> "any land, right of way, *or material* needed to enable it to maintain, operate, or *prosecute* works for the improvement of rivers and harbors for which provision has been made by law."
>
> U. S. vs. Certain Lands in Narragansett, R. I., 145 Fed. 654, 657;
>
> Houck vs. U. S., 201 Fed. 867.

The recent decision by this Court of the case of U. S. vs. Buffalo-Pitts Company, 234 U. S. 228, is confidently relied upon for the reason that it is impossible to distinguish that case from the case at bar. In both cases the contract was

for the construction of public works authorized by Acts of Congress.

Reclamation Act, June 17, 1902, 32 Stat. 388;
Appropriation Act, March 3, 1905, 33 Stat. 1131.

The authority conferred upon the Secretary of War by Congress to exercise the Government's right of eminent domain in the work of improving the navigation of rivers and harbors, is conferred in practically the same language as that which is employed in the statute conferring upon the Secretary of the Interior similar power in connection with reclamation projects.

Act of April 24, 1888, Ch. 194, 25 Stat. 94;
Act of June 17, 1902, 32 Stat. 388.

In both cases the contracts were awarded to and stood in the names of parties other than the owners of the plant and equipment placed upon the sites and used in the performance of the work. In the Buffalo-Pitts case the engine in question was placed upon the site of the work shortly before the default and annulment of the contract, and in the case at hand, the buildings, plant, equipment and materials had been placed upon the site of Lock and Dam No. 6 more than a year before the default and annulment of the contract.

In the Buffalo-Pitts case the chattel mortgage under which said company claimed title to the engine was not filed for record until the engine had been actually delivered on the site of the work and actually used in the prosecution thereof. In the case at hand the buildings, plant, equipment and material had been upon the site of Lock and Dam No. 6 and actively used in construction for over a year before the annulment, and thereafter remained upon the Lock and Dam site in the possession of the Government for about six months

before the plaintiff corporation acquired title or ownership to said property.

In both cases the contracts contained provisions entitling the Government to take possession of and use the plant, equipment and materials used or prepared for use upon the work in the event of annulment of the contract.

In both cases the contracts were annulled by the Engineer Officer in charge thereof for want of due prosecution of the work on the part of the contractors.

In both cases the Engineer Officers in charge of the work, acting under instructions of the Chief of Engineers, United States Army, in the one case, and of the Reclamation Bureau in the other case, refused to permit the removal from the construction sites of the plant and equipment involved.

In both cases this action on the part of the Engineer Officers in charge of the respective works, was based upon the contract provisions, although the contracts had been entered into with persons other than the owners of such property.

See Finding No. 17, Record, p. 17, of the case at bar, to the effect that Captain Waldron notified the President of the Hubbard Building & Realty Company that the property in question had been "taken possession of under the provisions of Paragraph 33 of the Original Specifications which form a part of the contract," a copy of said notification having been also sent to the petitioner.

See Finding in the Buffalo-Pitts case, paragraph V, page 17, of Record, reading as follows:

> "That the said Construction Company having made default in the performance of its said contract on or about the 7th day of June, 1905, was suspended from work thereunder, * * * and the United States on that day took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, pursuant to and under the provisions of said contract with the United States."

And see letter from the Department of the Interior to the Buffalo-Pitts Company dated August 2nd, 1905, and appearing on pages 46-47, of the Record, in the Buffalo-Pitts case, reading in part, as follows:

> " * * * Under the terms of said contract in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground, and if the engine referred to was delivered, the United States has taken possession of it under the terms of said contract.
>
> "The remedy of those furnishing labor or materials used by the contractors in the prosecution of contracts with the United States appears to be set forth in the Act of Congress approved February 24th, 1905 (33 Stat. 811)."

And see also letter from the Department of the Interior dated September 26th, 1905, addressed to the Buffalo-Pitts Co., appearing on pages 50-51 of the Record in the Buffalo-Pitts Company case, in which the Chief Engineer stated, among other things:

> " * * * Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all machinery, tools and appliances belonging to the contractor, upon the ground."

The communications from which the foregoing quotations are taken and to which reference is made, are the only communications that were received by the Buffalo-Pitts Company from the Government officials and there were no letters subsequent to the communication of September 26th, 1905:

And see the claim of the Buffalo-Pitts Company as stated on page 24 of their brief, filed in this Court:

> "They (*the Government employees*) claimed that the engine came under the contract, and therefore that they could hold and use it, but whether this was a Govern-

mental or proprietary right, the employees did not attempt to say or to inquire."

In both cases the representatives of the Government refused to recognize the claims of the owners of the property involved and denied all liability on the part of the Government to make compensation therefor.

See letter of Chief of Engineers, United States Army, of April 25th, 1910, copy of which was sent by Captain Waldron to Mr. Ball on April 28th, 1910, Defendant's Exhibit 18, Record, pp. 55 and 56, and Finding No. 16, in which the Chief of Engineers stated the Government's position to be as follows:

> "The United States does not recognize Mr. Ball in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

See letter of the Department of the Interior to the Buffalo-Pitts Company, dated August 2nd, 1905, and quoted in full in the Record in the Buffalo-Pitts case, pp. 46 and 47, in which the Acting Director stated:

> "The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States appears to be set forth in the Act of Congress approved February 24th, 1905 (33 Stat. 811)."

See Record in Buffalo-Pitts case, page 55, where the Government officials in Washington in April, 1907, two years after the taking by the Government, advised the plaintiff's attorney that the Government had investigated the case fully and was not legally liable and rejected the plaintiff's claim.

In both cases the property involved was turned over by the Government to the contractors to whom were awarded

contracts for completing the respective works; was used by such contractors, and after the completion of the works was, in both cases, left upon the Government reservations.

It does not appear whether or not the contractors who succeeded the original contractor upon the Hondo project, which was the work involved in the Buffalo-Pitts case, was required by the Government to pay a rental for the engine that had been taken from the Buffalo-Pitts Company, but, as we have seen, in the case at bar the respondent was required by the Government to pay it a substantial sum as rental of the buildings, equipment and machinery, and the sum of $2,640.96 for the materials turned over to it, and which were incorporated in the work.

This Court, in its opinion in the Buffalo-Pitts case, affirming the decision of the Circuit Court of Appeals, said, on pages 232, 233 and 234:

> "It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the company as mortgagor, and by virtue of the terms of the agreement, complete the work, but it could not in this manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances, we think the former decisions of this Court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within United States vs. Lynah, *supra*."

The case of U. S. vs. Société Anonyme des Anciens Etablissements, 224 U. S. 309, was an appeal from a judgment of the Court of Claims in favor of the petitioner. The suit was brought for the recovery of royalties or damages claimed to be due the petitioner on his contention that

the Government used a certain patented invention of the petitioner's assignee, Col. De Bange.

The principal question for determination, both in the Court of Claims and in this Court, was whether the acts of the Government officers, as shown by the correspondence and facts set forth in the findings were such as to constitute an implied contract, as distinguished from a tort, between the United States and the petitioner.

The following facts are taken from the findings in the record of that case:

The patented invention came to the attention of a gun foundry board of the United States, authorized by Act of Congress, and was directly brought to the attention of the United States Minister on June 26, 1891, in a letter from Colonel De Bange claiming compensation for the unauthorized use by the United States Government of his invention. In the same year he presented his claim in writing to the Secretary of State at Washington. This letter was the subject of official comment between departmental officials, who passed unfavorably upon his claim and who took the position that the gas check used by the United States Government was covered by patents which it itself owned, and that, therefore, there was no ground for a claim of infringement. On January 31, 1894, formal claim was again made to the War Department and Navy Department of the Government, demanding payment for the use of the invention.

On February 10, 1894, the Secretary of the Navy replied to the claimant, stating that the status of the case had not changed, since it had been determined in 1891 that the gas check adopted by the United States Government resembled in certain features the claimant's patented invention, but that it also differed from it materially in certain particulars which were original in the Navy Department. And the Secretary of the Navy closed his letter by saying:

> "and as the matter has been previously disposed of by the Department, no further consideration of the case appears to be required."

During all of this time the invention had been used by the United States under the claim that it was the property of the United States under certain patents owned by it. On December 31, 1894, the final communication was forwarded by the War Department to the petitioner in respect to his claim. It advised the petitioner that his claim, if pursued, would probably involve other similar patents in use, and contained the suggestion that recourse might be had to the Court of Claims by him if desired.

On January 31, 1895, the Societê filed its petition in the Court of Claims.

The Government in the Anciens Etablissements Case, in its brief filed in this Court, claimed the following assignment of error:

> "That the Court erred in failing and declining to hold that the facts disclosed by the correspondence between the parties hereto constituted an infringement or tortious use by the United States of the device alleged to be covered by the patent in suit; and that the Court erred in holding that it had jurisdiction of this cause, as of an implied contract in fact, arising out of the correspondence showing the relation of the parties hereto in connection with the claim in question."

The position of the Government before this Court was that there was never any meeting of the minds of the parties in the suit, and certainly not as to the recognition of any obligation by the Government, or as to any promise on the part of the authorized officers of the Government to compensate the claimant for such use. The cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, were claimed to be directly in point and decisive in favor of the Government. The Government claimed that the Societê made no claim for compensation except as its letter of June 19, 1891, could be considered such a claim, and this letter, if showing any claim at all, was a claim not for an authorized or permitted use, but for "an unauthorized and surreptitious use";

or, in other words, "a tortious use," out of which no implied contract in fact to pay compensation could arise. The Government further contended that no board or authorized officer made any declaration that they were of the opinion that the claimant should be compensated. It was strongly urged that the Government used what it did under a claim of right derived from the Davis and Gerdom patents, for which it paid; and that it used the device before any demand or request for compensation, without any intent expressed to give compensation, and without any course of conduct from which an agreement to give compensation could be implied from the mere use.

The Government further argued that when the claim in question was presented to the Departments of this Government the officials were careful not to make any acknowledgment of the Societé's right to compensation; instead, their position as stated to the claimant was that "there appears to be no proper ground for the claim of Colonel De Bange"; that the Department had reached a decision that there was no ground for the claim in question; and that the claimant, having been notified of the Department's action, there was nothing on which to predicate an understanding that the Government would pay for the use of De Bange's invention. And finally the Government claimed that the suggestion in the letter of the Secretary as to recourse to the Court of Claims did not confer any rights upon the claimant any more than it did in the Russell Case, and did not bind the Government in any implied promise to compensate the claimant for the use of the invention in question.

This Court, however, after considering the cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, held in the Anciens Etablissements Case that an implied contract had been raised to pay for the property, stating at page 320:

> "It is not possible to review the arguments by which the claimant asserts and the Government denies the

sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the Government. The ultimate contention of the Government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but 'there must be (1) a use of it with the patentee's assent, and there must *also* be (2) an *agreement* or *meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use,* even though the amount of the compensation be not fixed. These elements, it is insisted, were present in the Berdan Case, which we have seen was relied on by the Court of Claims; they are, it is further insisted, absent in the case at bar.

"But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it because there was doubt as to how far the devices used were attributable to or belonged to De Bange or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it."

In short, the position of the United States in the Anciens Etablissements Case was: We deny that we are using your property and advise you that you have no claim; if you still think you have a valid claim against the Government, the Court of Claims is open to you.

In the case at hand the Government, never asserting any proprietary right in the property, gave credit to the con-

tractor for the property, thus showing much more clearly than in the two cases previously decided by this Court, and quoted herein, that it recognized a liability for the value of such property.

In the Anciens Etablissements Case this Court said there was doubt and hesitancy as to the extent of the liability for compensation. So, in the case at bar, there was doubt as to the person who was entitled to be paid, and as the Circuit Court of Appeals said, the Government recognized the wrong person as owner, but clearly showed its attitude of liability to whomever should prove to be the true owner, by crediting the value of the property in the Government account relating to this particular job. In the Anciens Etablissements Case, after the interchange of communications between the claimant and the Government had ceased, and years afterwards when the claimant had pursued his claim in the Court of Claims against the opposition of the United States, it was established that the property used by the Government *was* the claimant's; *i. e.*, covered by his patents rather than by those licensed by the Government. And in the case at hand it developed that the Government was at first uncertain as to its rights to deal with this property under the contract, and that at first it mistakenly interpreted its rights thereunder, but nevertheless continued to hold the property, making no proprietary claim thereto, but crediting its value to the nominal contractor in the account kept relative to this particular improvement.

The case of U. S. vs. Lynah, 188 U. S. 445, was an action against the United States for compensation for the taking of certain real estate in South Carolina. It appeared that in improving the navigation of the Savannah River the Government had built dams which raised the water in the river, backed it up against the embankments, and prevented the drainage of the plaintiff's plantation. There was no specific Act of Congress authorizing the appropriation of this specific

property. The case was tried on the theory that the Government could not be held responsible for what it had done. In holding that the claimants were entitled to compensation from the Government for the taking, this Court said at page 462:

> "The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'
>
> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

In United States vs. Great Falls Manufacturing Company, 112 U. S. 645, there was such informality in the Government's condemnation proceedings that the seizure of the property was without warrant of law, except that Congress had authorized the public improvement and made appropriation therefor. This Court held that there was an implied obligation on the part of the United States to make compensation to the owner:

> "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant

might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl vs. United States,* 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an Act of Congress, as private property to be applied for public uses.

"In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an Act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose." (Pages 656, 658.)

The same case was before this Court a second time in Great Falls Manufacturing Company vs. Garland, 124 U. S. 581, when it was again held:

"It was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the Act under which its officers have proceeded."

It was established in the last-mentioned case that the Engineer had taken more property for the public improvement than had been authorized by Congress to be taken, and it was contended by the Government that it could not be held responsible for such unauthorized act of its officer; that such act amounted to a tort on the part of the officer; and that, therefore, no implied contract to compensate the owner for the property so taken, could be predicated.

This Court disposed of this defense by observing:

> "It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the Act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property * * * taken, used, and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map or not."

In all these cases, as well as in the case at bar, the Government took property or rights that were needed by it in the making of public improvements or in furtherance of public welfare, but to which it asserted no title vested in the Government prior to the taking. Thus the Government acted under its sovereign power of eminent domain, a power which is, however, subject to the limitation imposed by the Fifth Amendment of the Constitution:

> "Nor shall private property be taken for public use without just compensation."

In the case at bar the statute conferred the right of eminent domain upon the Secretary of War, and it was exercised directly and immediately by the taking and holding of the petitioner's property. The action of the Army Engineers was the exercise of a Governmental right. Only a sovereign power would assume such a right as was asserted by them. In order to complete a public work they commandeered the buildings that had been erected upon the Government reservation and the plant and equipment that had been assembled there by the only persons who ever did any work towards the performance of the Hubbard Building & Realty Company contract, namely, Messrs. Ball and Carden, but they did not take this action until after Mr. Ball had deliberately abandoned the work. The Government Engineers made no claim that the property in question had be-

come the Government's property. They asserted that under the terms of the contract the Government had the right to retain and use it in the completion of the work and also to purchase it at a price to be determined by the Engineer Officer in charge, but the purchase was a mere incident, the important fact being the retention for use in completing the work, of the property involved. This point is emphasized by the dissenting opinion of Judge Noyes of the Circuit Court of Appeals, in the Buffalo-Pitts case. The learned Judge assumed that the Government's employes claimed a proprietary right in the engine, but in this he went beyond the evidence as the claim of the Government's employes was that the engine came under the contract and that, therefore, they could hold and use it, but whether this was a Governmental or proprietary right, the employes did not attempt to say or to inquire.

As was said by this Court in the Lynah Case, *supra*:

> "Very different from this proprietary right of the Government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal and real property whenever its necessities, or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation."

The petitioner in its brief (page 19) concedes that the Government made no claim to the ownership of the property in question, but continuing its argument emphasizes its claim that the Government made no immediate payment for the property, and only gave credit at a considerably later date

for the alleged value thereof, and gave that credit to the contractor. The petitioner did, indeed, some months after the taking, propose to the Government in its letter of June 8, 1910, that the Government must pay for all of this property before "taking any manner of possession of any of the property" (Record, p. 57). But the annulment clause of the Hubbard Building and Realty Company contract (Art. 4, page 38 of Record) provided in express terms that in the event of annulment, all money due or to become due and retained percentages on the contract should be retained by the Government until the final completion and acceptance of the work. In view of the situation as disclosed in the trial and by the findings, persisting through the entire work on this contract, the manner of crediting the value of the property was the natural and safe position for the Government to take as a matter of departmental accounting. It establishes consistently with the previous acts of the Government and its officials a disclaimer on its part of title or ownership of the property; and it establishes likewise an intent on the part of the Government *to pay* for such property.

II.

Even Although it Should Be Held That the United States Did Not in This Case Take the Buildings, Machinery and Materials by Virtue of its Sovereign Power of Eminent Domain, Nevertheless it had the Right Under Paragraph 33 of the Specifications to Hold and Use Said Property in the Completion of the Work, and Therefore the Use by the Respondent of Said Property Under the Circumstances Shown in the Findings was Not Tortious, and Does Not Render the Respondent Liable to the Petitioner for a Conversion Thereof.

It must be conceded that in order to recover the plaintiff in an action for damages for the wrongful conversion of personal property is bound to establish by legal proof:

1. General or special property and possession, or a right of immediate possession, in the plaintiff, at the time of the alleged seizure and conversion.

2. An unlawful seizure and conversion of said property by the defendant to his own use.

Bigelow on Torts, sec. 500, p. 248;
Cooley on Torts, p. 848;
Morey vs. Hyde, 65 Conn. 516;
Byrne vs. Weidenfeld, 99 N. Y. S. 412;
Hall vs. Simmons, 125 Ga. 80.

Title in the plaintiff is not sufficient; he must show that he has not only the title, but also the possession or the right to immediate possession.

The petitioner, in the case at bar has failed to present a case that meets the requirements of this test. It is not by any supposed weakness of the title to the property in question in the respondent that the petitioner can succeed, but solely upon the strength of its own title and its right, if it had any, *to the possession of the property in June or July,* 1910.

That the petitioner was not in either actual or constructive possession of the property at that time or for a long time prior thereto is clearly established. Mr. Ball had on September 9, 1910, deliberately abandoned the work of constructing an important public improvement for the United States Government. He was a contractor operating extensively under and in the employ of the United States Government in the construction of other locks and dams on the Trinity River in Texas, and he knew what Government work means, and particularly what section 33 of the specifications

under the contract for the construction of lock and dam No. 6 meant. His partner, Mr. Cardon, was the president of the Hubbard Building & Realty Company, and although the Findings of Fact do not disclose just what arrangement was made between Mr. Ball and his partner's corporation for the performance of the work of constructing the lock and dam, first by the co-partnership of "Ball-Carden Company" and afterwards by Mr. Ball, individually, nevertheless the Findings do disclose and establish the fact that Mr. Ball received and placed to his own personal and individual credit in the bank where he kept his account, every dollar that was paid by the Government for the work done under the Hubbard Building & Realty Company's contract from December, 1908, to September 9, 1909; and that during the latter part of that period, after the dissolution of the firm consisting of himself and Mr. Carden, he directed the work himself through his superintendent, Oscar Shanks. It is inconceivable that the buildings, plant and materials to do the work required to be done under the contract could have been placed by Mr. Ball and his partner upon the Government reservation and used in and upon the construction by them, without their having full knowledge of the requirements of the specifications for the doing of the work. Mr. Carden was president of the company in whose name the contract stood and in whose name all business with the Government had to be conducted. It was Mr. Carden who made the written applications to the Government for the extensions of time. Whatever the arrangement was that resulted in the doing of the work by Carden and Ball instead of by the Hubbard Building & Realty Company, it is perfectly obvious that the contract between that company and the Government could not have been assigned to Carden and Ball or to anyone else; for by its very terms it was provided that "neither this contract nor any interest therein shall be transferred to any other party or parties" (Findings, pp. 14 and 34, Rec-

ord). And even without this provision, the same prohibition against the transfer of any interest in the contract or the proceeds thereof is made by Section 3737 of the Revised Statutes of the United States, which is as follows:

> "Sec. 3737. No Transfer of Contract. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."

And because the contract could not be assigned to Carden and Ball they were obliged to do exactly what we find they did, in fact, do; namely, they carried on the performance of this public work by keeping alive the corporate existence of the Hubbard Building & Realty Co., one of them being its president, and by using its name in the dealings that they had with the Government Officers; a practice which is often resorted to; which is familiar to everyone who has any experience with Government contracts, and which results in no harm to the public interest, and therefore has been held not to be within the mischief which Congress intended to prevent when it prohibited the transfer of any interest in a contract to which the United States is a party.

Hobbs vs. McLean, 117 U. S. 567;
Fields' Case, 16 Ct. Cl. 434;
Bowe vs. U. S., 42 Fed. Rep. 761.

And to have taken a power of attorney from the Hubbard Building & Realty Company authorizing the attorney to collect the Government payments under the contract and deliver them to Mr. Ball would have resulted in the annulment of the contract under the authority of the decided cases.

Francis' Case, 11 Ct. Cl. 638.

It is fair to assume that experienced Government contractors such as Messrs. Ball and Carden knew, to use the language of Attorney-General Garland, that "the parties to an assignment may suffer damage, but can derive no benefit from an assignment of a Government contract."

18 Op. Atty. Genl. 88.

Mr. Ball was the financial member of the firm and furnished a large part of its capital, which was employed in purchasing the plant and materials and in doing the work under the contract after December, 1908, and until September 9, 1909. He received all of the payments made by the Government during the same period. It was only possible for him to receive these payments by keeping alive and using the name of the corporation in whose name the contract stood and of which his partner was president, because had he taken an assignment of the contract such act would have defeated his purpose by causing its annulment. For all practical purposes he stood in the shoes of the nominal contractor, performing the work and receiving the pay, and as an incident thereto being obliged to place at the site and use the buildings, plant and materials involved in this case.

It is, therefore, for this Court to decide whether a man can accept the benefits of a Government contract, as Mr. Ball has accepted those of this one, and at the same time escape its burdens.

The proposition is this: Can a contractor perform the work called for by a Government contract, the performance whereof requires the use of plant and materials, which he assembles and uses upon the Government reservation, receiving for his work the regular monthly payments made by the Government therefor and, when it suits his convenience, abandon the work and thereafter successfully maintain the position that the plant, materials and even the buildings erected by him on the reservation, which it was necessary for him to place there and use before he could receive the benefits of

the contract, are in no way subject to the terms of the contract in the performance of which they are employed; terms that are reasonable in themselves and that are incorporated in all such Government contracts for its necessary protection?

It would be absurd to contend that the Hubbard Building & Realty Company is not bound by Section 33 of the specifications.

The question, therefore, is, can Mr. Ball step into the shoes of the Hubbard Building & Realty Company and perform the contract in its name, receiving all of the benefits thereof, but remaining unaffected by the provisions of Section 33?

It will be observed that this section is carefully worded so as to include all the buildings, materials, machinery, etc., or any part or parts of same *"prepared for use or in use in the prosecution of the work,"* whether the property of the contractor or otherwise. The only limitation is to be found in the words *"prepared for use or in use in the prosecution of the work."* The buildings, plant and materials assembled upon the work and used by Mr. Ball and his firm were "prepared for use" and were "used in the prosecution of the work." This is conclusively established by Findings of Facts Nos. 3, 5, 7, 8, 9, 10, 14, 18, 19 and 22.

Section 33 of the specifications became operative only "in case of the annulment of this contract as conditionally provided in the form of contract adopted and in use by the Engineer Department of the Army."

The contract could only be annulled upon the happening of the contingency mentioned in Section 4 thereof.

So long as the work under the contract was being prosecuted "faithfully and diligently" in accordance with the specifications, the United States had no right to annul it; and, therefore, had Mr. Ball faithfully continued the work for which he had brought the property upon the site instead of having abandoned the work when it suited his purpose

to do so, his property would have remained unaffected by Section 33.

This immunity could be lost, however, in one way, and in only one way, namely, by a failure on the part of Mr. Ball to prosecute faithfully and diligently the work required to be done.

There was nothing unreasonable and there was no hardship in this situation.

The Government merely attempted to protect itself against delays and excessive cost of completion that might result from the abandonment of the work or the failure to prosecute it faithfully and diligently in accordance with the specifications and requirements of the contract.

It was to the advantage of all concerned that this protection should be afforded by the contract; to the Government, because the work was needed at the earliest possible date and at the lowest possible cost; to the contractor, because having assumed to do the work he would be responsible to the Government for any cost to it, over and above the contract price, incurred in procuring the completion thereof; and to the contractor's surety, for obvious reasons.

It may be argued that Mr. Ball was under no obligation to the Government to continue the work any longer than he might deem it to be to his interest to do so. This may be admitted, but it is nevertheless true that if he chose to abandon the work, his buildings, plant and materials would become subject to the provisions of Section 33 of the specifications, because the Government had expressly stipulated that such result should follow as a necessary consequence of the annulment by it of the contract, and certainly he could not go upon the Government reservation and do work there for the Government upon terms more favorable than those available to the nominal contractor. If he desired to prevent this result, all he had to do was to continue the work, upon which he and his firm had entered, until it

was completed, and then he could have removed his plant from the Government reservation. In that event there would have been no materials to be removed, as they would have become part of the finished structures.

He elected, however, to discontinue the work—he did more than this—he completely abandoned it, as the District Court found as a fact in Finding No. 11 (Record, p. 16), and it is significant, we think, that the abandonment was not the result of any action on the part of the Government, but it was his own *deliberate act.*

The date of his abandonment of the work was September 9th, 1909, and the Government waited until October 22nd, 1909, before taking any action as a result of said abandonment, when it caused to be issued a formal written notice of the annulment of the contract pursuant to its provisions.

The property in question was thereafter kept and held by the Government on the dam site, and it was not until April 30th, 1910, that the Government advertised for proposals for the completion of the work, and not until July 18th, 1910, was the property delivered by the Government to the respondent, nor did the respondent use any of it until it was delivered to it by the Government.

It is thus apparent that the predicament in which the property was placed was the direct and inevitable result of the deliberate act of Mr. Ball in his abandonment of the work for the performance of which he had placed it upon the Government reservation, and which for at least ten months prior to his abandonment he and his firm had used in the prosecution of said work.

If the important right reserved to the Government by the contract and which, as Section 33 shows, is reserved in "the form of contract *in use by the Engineer Department of the Army,*" can be lost by an arrangement between the nominal contractor and the contractor who actually does the work, by which the one doing the work is allowed to do it in the

name and in the place and stead of the nominal contractor, the consequence will be serious, not alone to the Government, but also to all contractors who are in competition for public work with any who may contemplate the creation of a situation that will enable them to play fast and loose with the Government; that is to continue with the work only so long as it is profitable, and withdraw from it with their buildings, plant and materials when it ceases to be advantageous to them to continue.

As above mentioned it is inconceivable, under the circumstances disclosed by this record, that Mr. Ball did not have *actual* knowledge of the provisions of paragraph 33 of the specifications at the time the property in controversy was brought to the site. But be that as it may, he certainly is chargeable with *constructive notice* of these provisions.

This question is left open on the Findings, as the committee who heard the case, instead of finding or stating any ultimate fact on this question of knowledge of Mr. Ball and the petitioner, set forth in his report the detailed facts relevant thereto, supplemented by certain correspondence, included in, and made a part of the report; and this report was adopted unchanged by the District Court on its Finding in this case (Findings 3-10, 12-13; Record, pp. 14-16, 21-23).

As a member of the partnership of the Ball-Carden Company, Mr. Carden was the agent of Mr. Ball in this work.

> "It is one of the fundamental principles in the law of partnership that, within the scope of the partnership business, each partner is the agent of all the other partners for the transaction of the partnership affairs, and his acts are the acts of all."
>
> Mechem on Agency (2nd Edition), 185.

Mr. Carden, as president of the Hubbard Building & Realty Company, and shown to have been actively engaged on this particular work (Record, pp. 14, 15 and 16), had knowledge of the provisions of paragraph 33 of the specifica-

tions. Mr. Carden, the agent of his co-partner, Mr. Ball, having knowledge, Mr. Ball is *charged with notice.*

> "It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal."
> Mechem on Agency (2nd Edition), 1803.

> "It has been held that where several persons have common interests in the same subject-matter, notice to one of them operates as notice to all."
> 21 Am. & Eng. Enc. of Law (2nd Edition, 587, Sec. 8).

But the Government's right to hold and use the property under paragraph 33 of the specifications is not alone to be determined by the knowledge or action of Ball. Mr. Carden, as president of the Hubbard Building & Realty Company, and shown to be in active charge of the work for the company, must be conclusively presumed to have had knowledge of the terms and conditions of the contract and specifications, and he, Carden, acting through his partnership, the Ball-Carden Company, brought this property on the site with this knowledge. His act is binding on the partnership.

The question, therefore, resolves itself into this:

Does the Government under a contract containing a provision such as paragraph 33, acquire the right to take possession and use property brought to the site for the purposes of the construction by a party who knows that it is to be so used, and who knows of the provisions of the contract?

There can be no doubt but that the Government does acquire such right under those circumstances. The conditions make this necessary. The Government was constructing a lock and dam in a remote region of Texas. The buildings were put up and the machinery and material were brought there expressly for this work. The buildings were built to

house the men who performed the labor of constructing the lock and dam. The Government intended to use such buildings, machinery and material as were erected and brought there, if suitable for its purpose, until the work was complete, no matter when or by whom it was completed. Not only is this made evident by paragraph 33 of the specifications, but such is the established practice and custom of the Government; a practice and custom that those dealing with it or with the contractor employed on the work must be presumed to have known.

The practice and custom has grown out of the necessities of the case and the sovereign authority of the Government. Government work must be completed and must be expedited. Its enterprises are inaugurated not for private advantage, but for the public welfare. These enterprises are conducted at far distant and inaccessible points, and the mere assembling of the plant and material is often a most difficult and tedious part of the transaction. For the Government to lose the benefit and use of plant and material when once brought to the building site would entail serious loss of time and add greatly to the cost.

Therefore, it follows that the provisions of paragraph 33 of the specifications, so far as they relate to the taking by the Government, do not confer any new or additional power or authority upon the Government; they merely state rights and powers that the Government inherently possessed without regard to them. They do not confer and, in fact, do not profess to confer, any proprietary rights upon the Government. They merely assert that the Government may take; a power it already had. By the Act of April 24, 1888, Congress authorized the Secretary of War to take and condemn materials needed to enable him to "maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law." (Act April 24, 1888, Ch. 194; 25 Statutes at Large, 94.)

The provisions of paragraph 33 in regard to the valuation of the property is merely an administrative detail, inserted to avoid trouble and exasperating disputes. So far as the property belonging to the contractor is concerned, there can be no question but that this method of arriving at a basis of settlement is valid and binding, and we believe that it is equally binding upon those who are so closely and intimately associated with the contractor as to be reasonably chargeable with knowledge of the provisions of the contract.

For a recent case on all fours with the case at bar, we respectfully invite the attention of the Court to

Tinker & Scott vs. United States Fidelity & Guaranty Co., 169 Fed. Rep. 211 (1909).

This was an action of trover, and the following facts were established:

On the 23rd day of September, 1905, the United States let to Prendergast & Clarkson, a corporation, a contract for the construction of the Shoshone Dam and auxiliary works, Shoshone Project, Wyoming. Section 22 of the specifications, made a part of the contract, was as follows:

> "22. Suspension of Contract. Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true intent and meaning, at any time during the progress of the work, notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the

works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant, or efficiencies will not relieve the contractor from his obligation to perform good work or finish in the time agreed upon."

It will be observed that the right given to the United States by this specification was to

> "take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract."

Thus, so far as plant and equipment is concerned, the provisions of Section 22 of the specifications under the Prendergast & Clarkson contract correspond with those of Section 33 of the specifications under the Hubbard Building & Realty Company contract. There is a difference between the two, however, so far as materials are concerned, for Section 22 of the Prendergast & Clarkson contract provided that the Government might seize only such materials *as belonged to the contractor* and were delivered on the ground.

On February 26th, 1906, Prendergast & Clarkson, the contractor, entered into a contract with Tinker & Scott, the plaintiffs, whereby Tinker & Scott agreed to furnish Prendergast & Clarkson the entire quantity of crushed stone and sand to be used for concrete in the construction of certain portions of the dam, and further agreed to furnish and main-

tain adequate plant, consisting of power plant, crushing, screening and conveying plant, and all other necessary equipment and appliances that from time to time might become necessary to keep the organized forces of Prendergast & Clarkson furnished with concrete material. Tinker & Scott began work under their agreement and continued until August, 1906, and during that time they assembled at the site a large quantity of tools, plant, implements and equipment for use in carrying on their work, all of which were at the time of the alleged conversion their absolute property. In August, 1906, the Government annulled its contract with Prendergast & Clarkson and seized all of the tools, plant, implements, equipment and materials of every kind and description upon or in the vicinity of the site of the Shoshone Dam, and a new contract having been entered into between the Government and the United States Fidelity Company for the completion of the work, all of this property was delivered by the Government to the new contractor and was used by the new contractor in the completion of the work. Tinker & Scott, claiming that this property had been tortiously taken from them, sued the United States Fidelity & Guaranty Company for the conversion thereof. This property was in the possession of Tinker & Scott, and they were proceeding with their part of the work when the Government annulled the contract because the progress that was being made by Prendergast & Clarkson was not satisfactory to the Construction Engineer in charge thereof, the engineer acting, however, under the orders of his superior officers, as in the case at bar.

We quote from the opinion of the Court:

> "As I construe paragraph 22 of the specifications of Prendergast & Clarkson's agreement to construct the dam and auxiliary works, Shoshone Project, the Secretary of the Interior was authorized, upon a failure by Prendergast & Clarkson to carry forward the work with reasonable dispatch, to take possession of all machinery, tools appliances and animals employed on any part of

the works to be constructed under the contract. The contract does not read 'employed by the contractor,' but all machinery, etc., 'employed on any of the works,' comprehending, by fair and unmistakable intendment, employment by anyone, whether by the contractor or any sub-contractor, so that they were employed upon the works. This rendition becomes more apparent by a further reading of the clause, as follows: 'And of all materials belonging to the contractor delivered on the ground'—thus limiting the materials that might be taken to such as were owned by the contractor and then upon the ground. But as to the machinery, tools and appliances, there is no restriction except that they should be employed upon the work. The Secretary of the Interior is further authorized to use the same—that is, such machinery, appliances, tools and materials as he is empowered to take possession of—to complete the work, or he may employ other parties to carry the contract to completion. * * * It is unnecessary to extend comment upon the testimony showing its bearing and relation and what it tends to prove. It is sufficient that the conclusion of fact is as stated. 'The Government took possession on August 14, 1906, and turned the entire property over to the defendant about the middle of September.' * * * As it relates to the crusher plant, which was in the possession of Tinker & Scott at the time, the Government had the right and authority to take it into its possession, under the terms of the contract with Prendergast & Clarkson, upon their failure to proceed with the construction work, as stipulated in paragraph 22, *the Government having taken possession of this plant under lawful authority, and having turned the same over to the defendant for use in the completion of the work in pursuance of the purpose of Prendergast & Clarkson's contract, the defendant is therefore in lawful possession, and is not chargeable with a conversion of the plant. The power plant was taken by the Government, and turned over to the defendant in the same way, so there is also no liability on the part of the defendant in trover by the real owners, whoever they may be.*" (The italics are ours.)

Certain features of the Tinker & Scott case render it a much stronger case from the standpoint of the petitioner than is the case at bar.

For instance, Tinker & Scott not only had title, but also possession of the chattels in question; they were merely subcontractors under the general contractor, and did not stand in the relation of general contractor to the Government as did Mr. Ball when he and his partner went upon the Government reservation on the Trinity River, placed the buildings, equipments and materials upon it; performed all the construction work that was performed after they took it over and prior to Mr. Ball's abandonment of it; and received all of the Government pay for said work.

Again, Tinker & Scott were in no way responsible for the annulment of the contract which set in motion the Government's right to seize, retain and use, or cause to be used, the plant in the completion of the work; but Mr. Ball's abandonment was the sole cause of the annulment of the Hubbard Building & Realty Company contract.

Tinker & Scott could not maintain an action of trover for the conversion of their plant and equipment, because they had placed it in a situation where it became subject to the right of the United States to appropriate it for the purpose of completing an important public improvement.

We also refer the Court to a case very similar to the case at hand and reported in Vol. 15 of Decisions of the Comptroller of the Treasury, p. 199 (1908).

This case is known as the *Baker Contract Case,* and the contract involved in the case contained a provision similar to paragraph 33 of the specifications in the Hubbard Building & Realty Company contract, viz, that in case of annulment as provided for in the contract the United States reserved the right to purchase the plant and materials prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer.

One of the questions decided was whether the receiver of the contractor was entitled to immediate payment for the plant of the contractor taken by the United States under the above-mentioned clause, or whether the United States Government was entitled to withhold the payment therefor under Article 4 of the contract (an article similar to paragraph 4 of the Hubbard Building & Realty Company contract) until it should be ascertained whether the cost to the United States of completing the work was greater than the price stipulated in the contract with the Baker Contract Company for completing the same.

The opinion declared that paragraph 43 of the specifications gave the Government the right to purchase the plant and materials in use by the contractor at the works on the annulment of the contract. It further decided the point as to the right of the receiver of the contract to immediate payment for such plant, as follows:

> "On exercising that right the Government would have the right to demand delivery if it did not already have possession of the plant; and on delivery, the title to the plant would vest in the United States, and it would be liable for the purchase price; the title to the plant, however, would pass on delivery, and would not be dependent on payment of the purchase price.
>
> "After delivery the right of the contractor and those claiming under it would be a simple demand for the purchase price; but it does not follow, therefore, that the contractor would be entitled to immediate payment of the purchase price without regard to the state of accounts under the contract. In Rolling Mill Co. vs. Ore & Steel Co., 152 U. S. 615, the Court said: 'Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.' (See also Baer vs. Sleicker, 153 Fed. 129.)
>
> "The right to purchase the plant and the contractor's demand for payment therefor undoubtedly arise out of

the same contract or transaction. The sale on the one hand and purchase on the other mutually have regard to the liabilities springing from annulment of the contract; and there is no provision of the contract which negatives the right of the Government to interpose its counterclaim against a demand of the contractor at this time. Withholding payment of the purchase price is but the exercise of the common right which belongs to every creditor; and the provisions of Article 4 are not a limitation of that right, so as to entitle the Government to withhold only a particular class of money due or becoming due under the contract; but under a fair interpretation of the contract the purchase price of the contractor's plant is money becoming due under the contract, which the Government is entitled to withhold until final completion of the work." (See pages 203-204.)

As showing the practice of the Government under these War Department contracts, we refer the Court to the Digest of Opinions of the Judge Advocate-General of the Army (Howland, 1912), where it is laid down as a rule of action for engineer officers in charge of the construction of public works, as follows:

"Annulment of Contracts by United States.

"XXI D. Where contract provides for taking possession of and retaining plant, etc., of contractor on annulment, use of plant on other improvements."

"The contract for a river improvement provided for its annulment in case of the default of the contractor, and for its completion by the Government, the Government to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way, or quarry privileges, under purchase and at a valuation to be determined by the Engineer Officer in charge. The contractor having defaulted and the United States having taken possession *by way of purchase*, and that for the purpose of giving the defaulting contractor and its surety the proper debit

and credit in final settlement, the plant should be revalued, the United States to receive credit for any depreciation in the value of the plant resulting from its use in the prosecution of the work, and that as there was nothing in the contract requiring the plant to be sold for what it would bring upon the completion of the particular contract, there would be no legal objection to using the plant on other works of improvement, upon giving proper credit to the appropriation from which it was purchased." (C. 27,890, Mar. 6, 1911.)

Digest of Op. of Judge Advocate General Howland, 1912, at p. 288.

Clauses similar to paragraph 33 of the specifications are frequently to be found in public contracts.

Fuller vs. Doyle, 87 Fed. 687-693;

American Bonding & Trust Co. et al. vs. Gibson County, 127 Fed. 671-672 (145 Fed. 872);

International Cement Co. vs. Beifeld, 173 Ill. 179;

Hudson on Building Contracts, Vol. 1, pp. 574, 558, 559, 614 and 615;

Hudson on Building Contracts, Vol. 2, pp. 635 and 644;

P. H. McLoughlin & Co. vs. U. S., 46 Ct. Cl. 138-186;

W. A. Scott vs. U. S., 44 Ct. Cl. 524-531;

Rector vs. McDermott, 13 Southwestern, 334;

Ranger vs. Great Western Co., 5 H. L. C. 72;

Waite on Engineering and Architectural Jurisprudence, secs. 710, 712 and 713.

Such a provision as Section 33 is not to be construed technically as a provision to enforce a forfeiture.

Duplan Silk Co. vs. Spencer, 115 Fed. 689 (Cir. Ct. of Appeals, Third Circuit, 1902).

This was an action of trover brought by the trustee in bankruptcy of a firm of builders who had contracted with the Silk Company to erect a mill for them, charging the conversion of certain chattels consisting of lumber, iron work, bricks, nails, cement and sundry builders' utensils. The bankrupts had practically completed the mill when they became unable to prosecute the work, and the Silk Company terminated the contract and took possession of the materials and utensils under the following clause of the contract:

> "Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, * * * and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall * * * be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor."

It was claimed on the part of the trustees in bankruptcy that the requirements of this article with regard to the notice to the contractors had not been strictly complied with, and as this article provided for a forfeiture a strict compliance was necessary. In answer to this argument, Judge Gray said:

> "The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building,

no suggestion of loss of property to the contractor by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described, would tend to minimize the loss that would otherwise accrue to the contractor from his own default."

(Note—A writ of error in this case was denied.)

See 191 U. S. page 526.

The purpose of the insertion of such a clause as Section 33 of the specifications is well stated by Farwell, J., in Hart vs. Porthgain Harbour Co., Vol. 1, L. R. Ch. Div. 690 (1903), page 696:

> "In my opinion these clauses are put in for the purpose, not merely of enabling the contract to be performed, but also as a due security for its performance. They are not mere machinery to enable Porthgain Harbour Co., either by themselves or by another contractor, to complete the performance of the contract, but they are also a security for the company that the work shall be performed; and the company are entitled to avail themselves of that security, if, by the default of the contractor, the work is not performed at all."

See also—

International Cement Co. vs. Beifeld, *supra*.

It is manifest from the terms of the contract, stated to be the regular form of contract adopted and in general use by the Engineering Department of the Army in all public work contracts; from the rulings of the War Department with reference thereto; and from the decisions of courts, construing the same; that one clear purpose of the Government exists throughout—namely, that, whether or not the Government shall be liable to compensate the true owner for such property assembled at the site "and used, or prepared for use, in the performance of the work," nothing shall interfere with the Government's right to take, hold and use such property,

to the end that the completion of the public work may be prosecuted without delay or unnecessary expense.

This seems to us to be the crux of the present case, and we respectfully submit that whatever rights Mr. Ball, or his corporation, the petitioner, may have against the United States, it is perfectly clear that, viewed from any angle, the United States had the right to do exactly what it did in this case—that is, prevent Mr. Ball from removing his buildings, plant and materials from the site of the lock and dam, and take, hold and use the same for the purpose of finishing the work at a minimum of delay and expense, and that it also had the right to deliver said buildings, plant and materials to the respondent, to the same end; and that this is particularly true when we consider that Mr. Ball stood, to all intents and purposes, in the shoes of the nominal contractor, and that by reason of his voluntary default or abandonment of the work he placed the Government in a position where it was necessary for it to take and hold the property for its protection.

The provisions contained in Section 33 of the specifications were inserted in the interest of the United States as a security and guarantee that the work would be performed to its completion, and as a protection against loss in the event of abandonment of the work by the contractor or anyone standing in the contractor's shoes. It was in the interest, therefore, of the Government that the property taken possession of by Captain Waldron, under orders from his superior officer, should be held by the Government and used in procuring the completion of the work through the employment of another contractor, and the act of the officer in so taking and using it cannot be regarded as tortious.

Bollman vs. Loomis, 41 Conn. 581;
Weinhouse vs. Cronin, 68 Conn. 250;
Mayor, etc., of Macon et al. vs. Huff, 60 Ga. 222;
Smythe's Estate vs. Evans, 70 N. E. 906;
Vol. 31 of Cyc. p. 1147;
Mechem on Agency, secs. 66-67, 455.

The Respondent has already paid to the United States in the form of a monthly rental of $380, the full value of the use of the buildings and plant leased by the United States to it under the assurance contained in Captain Waldron's letter of June 6, 1910, in which he said:

> "The fact that the material and machinery is on the Government reservation, or in the near vicinity thereof, *and the circumstances under which this office has not permitted its removal from the lock site,* is sufficient to assume that the Government has taken possession of the items you speak of at the present time."

It has also paid the United States the sum of $2,640.96 for the material "prepared for use" and which was also turned over to it by the Government. It returned to the Government promptly upon the completion of the work all of the plant used by it under Government authority.

It would be imposing a harsh injustice, and a very great hardship upon the Respondent to compel it to pay a second time for the material, and an exorbitant sum, in addition to the rental already paid by it to the Government, for the buildings and plant that the Government authorized it to use.

Not only will a reversal of the judgment appealed from compel the Respondent to pay twice for the property in question, but such reversal will have a far-reaching and very serious effect upon the administration by the United States Government if it cannot exercise its governmental and sovereign right to seize and take possession of buildings, material, plant and equipment employed upon the construction of public improvements, unless the title to said property happens to be vested and unimpaired in the *nominal contractor,* although the construction work is actually performed by some third party but in the nominal contractor's name, and although that third party may have enjoyed all the benefits of such performance under the contract.

Nor can the Government safeguard its interests by the employment of any more definite language in its public con-

tracts than is to be found in Section 33 of the specifications which are a part of the Hubbard Building & Realty Company contract, where the only qualifying words are those that limit the property which the Government is entitled to seize and hold to that which is "prepared for use or in use in the prosecution of the work."

CONCLUSION.

The judgment below should be affirmed.

All of which is respectfully submitted.

LEWIS SPERRY,
HARRY W. REYNOLDS,
J. KEMP BARTLETT,
Counsel for Respondent.

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Supreme Court of the United States,

OCTOBER TERM, 1918

No. 227.

BALL ENGINEERING COMPANY,
Plaintiff-in-error,

against

J. G. WHITE & COMPANY,
Defendant-in-error.

Brief for Plaintiff-in-error.

The case is here on writ of *certiorari* granted by this Court to review the determination made herein by the Circuit Court of Appeals for the Second Circuit.

The action is for conversion and was brought by the plaintiff-in-error, Ball Engineering Company, a corporation, hereinafter referred to as the "plaintiff," against the defendant-in-error, J. G. White & Company, a corporation, hereinafter referred to as the "defendant," for converting to its own use and using certain material, tools, plant, etc., belonging to the plaintiff. The suit was brought in the District of Connecticut and tried before a referee (designated under the Connecticut practice as a Committee). Two trials were had, the first trial resulting in a judgment in favor of the plaintiff for the value of the converted property (212 Fed. 1009). That judgment was reversed by the Circuit Court of Appeals (223 Fed. 618, 139 C. C. A. 164) and a new trial or-

dered which took place before the same Committee, who, upon the same evidence and the same findings of fact, was constrained, in order to conform to the opinion of the Circuit Court of Appeals (fol. 104) to render judgment in favor of the defendant. The judgment was affirmed by the Circuit Court of Appeals on the authority of its own prior decision in the case (Record, p. 126)—241 Fed., 989, 154 C. C. A. 661.

Statement of the Case.

The facts of the case and the history of the litigation are as follows:

In September, 1909, the United States annulled a contract which it had entered into in 1906 with the Hubbard Building & Realty Company, a corporation, for the construction of Lock and Dam No. 6 on the Trinity River, Texas. At the time of the annulment the work to be done under the contract had not been completed and the Lock and Dam were in an unfinished condition. There were then upon the site of the Lock and Dam certain tools, machinery, plant and materials belonging to the plaintiff (fols. 71-72; 77-78). Shortly prior to May 18, 1910, the defendant was in negotiation with the plaintiff for the purchase or rental of the tools, machinery, plant and materials in question which were still on the Lock and Dam site (fols. 88-89*), but the parties did not agree on the price. Thereupon tht defendant, on May 18, 1910, entered into a contract with the United States for the completion of Lock and Dam No. 6

*The folio and page references in parenthesis are to the Report of the Committee and to exhibits made part of the Report by its terms.

(fol. 87; Defendant's Exhibit 21, fols. 193-274). That contract contained a clause ("Insert E") (fols. 236-238) by the terms of which the United States bound itself to "exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with Hubbard Building & Realty Company to take possession of and retain all material, tools" etc., on the site of the Lock and Dam and to turn the same over to the defendant for use on the work *if asked to do so by the defendant*. The clause also contained the following:

> "It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor (J. G. White, the defendant) concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents." (Fols. 87, 237-238.)

In accordance with the foregoing provisions of its contract with the United States, the defendant, knowing that the property did not belong to the Hubbard Building & Realty Company and that it did belong to the plaintiff, requested the United States to seize the plaintiff's materials, tool, plant, etc., on the Lock and Dam site (pp. 30-31, 63-64). The Engineer Officer in charge of the work for the United States thereupon, under a mistaken

theory of the rights of the United States under paragraph 33 of the contract with the Hubbard Building & Realty Company, to be more fully referred to hereinafter, seized the plaintiff's property, coupling the seizure with an express statement in writing, both to the plaintiff and the defendant, that the materials, tools, plant, etc., "are taken possession of under the provisions of paragraph 33" of the contract between the United States and the Hubbard Building & Realty Company, and that the conditions under which the seizure was made by the United States were those set forth in "Insert E" contained in the contract between the United States and the defendant referred to above, which provided that all liability for the seizure should be upon the defendant and not upon the Government (pp. 30, 97-102).

Immediately upon receiving notice of the seizure the plaintiff protested in writing both to the Government and to the defendant against the seizure (pp. 30-31; letters of June 8, 1910, pp. 96-97).

The findings of the Committee establish, and in fact it has never been disputed, that the Engineer Officer seized the plaintiff's property solely in pursuance of the Government's alleged rights under the terms of its contract with the Hubbard Building & Realty Company and under the claim that the Government had the right under the terms of that contract to take the *plaintiff's* property located upon the Lock and Dam site and to give credit for the value, at an amount fixed by the Engineer Officer in charge of the work, upon the indebtedness of the *Hubbard Building & Realty Company to the United States, witout payment or credit of any kind to the plaintiff, the owner of the property.* (Pages 30-35; see also Defendant's

Exhibit 18, pp. 94-95; Exhibit 21, pp. 79-80; Exhibit 22, pp. 97-102; Exhibit 20, pp. 63-64. All of the above exhibits are by reference incorporated in and form part of the Report of the Committee.)

The position taken by the Engineer Officer was succinctly stated in Defendant's Exhibit 18, a letter from Captain Waldron, the United States Engineer Officer in charge, to the plaintiff, in April, 1910, setting forth the contents of a letter from the United States Chief of Engineers Bixby at Washington to Captain Waldron (Record, pp. 94-95; Committee's Report, fol. 88):

> "The United States has the right, under paragraph 33 of the specifications forming part of the contract to take possession of all or part thereof (plaintiff's property) under purchase at a valuation to be determined by the Engineer Officer in charge. * * * If the right is exercised, the contractor (Hubbard Building and Realty Co., which company did not own the property) will be allowed credit for the fair value of the plant and materials in final settlement; * * * The United States does not recognize Mr. Ball (plaintiff's assignor) in this matter except as the representative or agent of the contractor, the Hubbard Building & Realty Company. If the Hubbard Building & Realty Company was using on the work property belonging to Mr. Ball, it appears that Mr. Ball should have recourse to them, and not to the United States, to recover its value."

The defendant's answer in the present suit followed the same theory and alleged in effect that the United States had the right to and did take the plaintiff's property by virtue of paragraph

33 of the contract between the Government and the Hubbard Building & Realty Company (Record, pp. 13-15). The case was defended before the Committee on the first trial on the same theory. Both the Committee and the District Court decided against the defendant upon the merits of that defense and gave judgment in favor of the plaintiff for the value of the property. The Circuit Court of Appeals agreed with the lower Courts *in their rejection of that theory* and stated:

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company."
>
> *J. G. White & Co.* v. *Ball Engineering Co.*, 223 Fed. Rep., 618; 139 C. C. A., 164.

The theory upon which the Circuit Court of Appeals reversed the first judgment, which was in favor of the plaintiff and affirmed the second judgment, which was in favor of the defendant, will be found stated in the opinion of the Circuit Court of Appeals handed down on its decision of the first writ of error and reported at 223 Fed. Rep., 618, and 139 C. C. A., 164. For the convenience of the Court a copy of said opinion is hereto annexed and marked "Schedule A." In that opinion the Court, after summarizing the facts found by the Committee and stating that—

> "The Committee and the court below correctly held that the Government had no right to take the property of the plaintiff, a third

party, by virtue of anything contained in its contract with the Hubbard Company."

reached the conclusion that the judgment of the Court below, in favor of the plaintiff should be reversed for the following reasons, as stated in the opinion:

"All the same it (the Government) did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim and therefore was bound to pay the real owner of the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbar Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

* * * * * * * * * * * * *

"We have considered this general subject in U. S. *v.* Buffalo-Pitts. Co., 193 Fed. Rep., 905, affirmed 234 U. S., 228. In accordance with that decision we think that the Government took title to the property in question and leased it to the defendant, who in using

indebted to the Government, and without any payment or credit to the owner of the property.

The doctrine thus enunciated by the learned Circuit Court of Appeals seems to have had its origin in the opinion of that Court in the case of *United States* v. *Buffalo-Pitts Company,* 114 C. C. A., 119; 193 Fed., 905, at pp. 906-907. It is true that the Buffalo-Pitts case was affirmed by this Court (234 U. S., 228), but the opinion of this Court shows conclusively that it rejected the theory upon which the Circuit Court of Appeals had decided the case, and that the affirmance by this Court was because the findings of the trial Court, which were conclusive up on this Court, established the Government's use of the claimant's property without disputing his title or denying his right to compensation, and because an Act of Congress authorized the taking involved in that case. This Court said in part in the Buffalo-Pitts case:

> "We think the Circuit Court and the Circuit Court of Appeals were right in concluding that, under the facts found, the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed, and upon the representations made to it, and consented to the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the government, it is found that it was well known to it that the chattel mortgage existed, and its validity was undisputed, and that it would continue the use of the engine and appurte-

nances, and, if left in its possession, payment would be recommended for such use.

* * * * * * * * * * * *

"While the Government claimed the right to thus take and use the property, it nevertheless held it *without denying the right of the owner to compensation*" (pp. 232-233). (Our italics.)

This is in striking contrast with the facts in the case at bar, which are that, contemporaneously with the taking of its property, the plaintiff objected both to the Government and to the defendant against its use (Finding 16, Defendant's Exhibits 1 and 2, made part of Report by reference, fols. 89, 286-290), and never in any way consented or waived its rights; that the Government ignored the plaintiff's claim and took the position that it had the right to use the plaintiff's property under the contract between the Government and the Hubbard Building & Realty Company (Findings 17, 18, 19, fols. 89-92), and that the Government further claimed to have the right to use plaintiff's property without paying the plaintiff and indeed without *paying* the actual value to anyone, but merely upon crediting to the Hubbard Building & Realty Company the *value of the property as fixed by an officer of the Government at a figure now determined to be $3,500 less than its actual value, as an off-set against the indebtedness of the Hubbard Building & Realty Company to the Government* (Findings 26, 32, fols. 97-98, 103).

We submit that the opinion of this Court in the *Buffalo Pitts case,* clearly indicates that it would have reversed the judgment in that case if the

findings of the Court below in that case had established, as they do in the case at bar, that the owner of the property did not consent to the use of its property on a promise of compensation from the Government, but objected to its property being taken or used, and that the Government did not admit the owner's right to compensation, but denied it, and claimed a right to use the property without payment to the owner, by virtue of an alleged right claimed to exist under a contract between the Government and a third person.

(2) The opinion of the Circuit Court of Appeals in the *Buffalo-Pitts* case referred to and apparently relied upon the following language in the opinion of Mr. Justice Brewer in the *Lynah* case:

> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as owner, it does so under an implied contract that it will pay the value of the property it so appropriates." (U. S. *v.* Lynah, 188 U. S., 445, at p. 464.)

This language must, however, be considered in view (*a*) of the *facts* of the *Lynah* case, (*b*) of the *language used elsewhere in the opinion in that case,* and (*c*) of the *other and more recent decisions of this Court.*

(*a*) In the *Lynah* case the Government had appropriated property belonging to the plaintiffs, by flooding their land in the course of making a public improvement. The Government did not deny the title of the plaintiffs and there was no question at any stage of the case, but that if

compensation was to be paid, the plaintiffs were the persons entitled thereto. The Government did not claim that through any contract entered into with any third person it had the right to flood the plaintiff's lands and pay or give credit to the third person for the value of the property taken. Mr. Justice Brewer, who delivered the opinion of the Supreme Court in the Lynah case, thus summarized the position of the Government:

> "The government did not deny the title of the plaintiffs. It averred in the answer simply that it had 'no knowledge or information sufficient to form a belief,' but did not couple such averment with any denial, nor did it pretend that it *owned* the property or had a *paramount proprietary right to its possession.* It did not put in issue the question of title, but rested upon a denial that the acts its officers had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. *Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs.* It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable the statute of limitations had worked a bar * * * While there was no formal admission of record that the land belonged to the plaintiffs, the case was tried alone upon the theory that the government could not be held responsible for what it had done" (pp. 450-1). (Our italics.)

It will be noticed that Mr. Justice Brewer in the passage from his opinion quoted above,

pointed out that the Government did not claim either (a) to *own the property* or (b) to *have a paramount proprietary right to its possession,* thus distinguishing between *ownership* and a *paramount proprietary right to possession.* In the case at bar while the Government did not claim to own the property, it did claim to have a paramount proprietary right to its possession as against the plaintiff and without any obligation to pay the plaintiff.

Moreover, the opinion of Mr. Justice Brewer refers specifically to the fact that in the Lynah case the Government did not "set up any title to the property antagonistic to that claimed by the plaintiffs." In the case at bar the reverse is true—indeed, the only claim which was set up was absolutely antagonistic to plaintiff's, namely, a claim that the government had under its contract with the Hubbard Building & Realty Company a right to take plaintiff's property without payment to plaintiff.

(*b*) Mr. Justice Brewer in his opinion in the *Lynah* case discussed practicaliy all of the cases theretofore decided by the Supreme Court which involved a determination as to what facts establish a taking by the Government as sovereign upon an implied contract to pay its value, and what facts establish a mere tortious taking. The opinions in each of the cases thus cited contained a discussion as to whether there was or was not an implied contract between the Government and the owner of the property to the effect that compensation was to be paid the owner or whether the facts showed that there was no meeting of the minds, so that the taking was tortious. Thus

Mr. Justice Brewer quoted from the opinion of Mr. Justice Gray in the case of *Hill* v. *U. S.*, 149 U. S., 593, in which Mr. Justice Gray, referring to the cases of *U. S.* v. *Great Falls Manufacturing Co.*, 112 U. S., 645; *Hollister* v. *Benedict & B. Manufacturing Co.*, 113 U. S., 59, and *U. S.* v. *Palmer*, 128 U. S., 262, in which the United States was held upon implied contracts to pay the value of property taken, said:

> "But in each of these cases *the title of the plaintiff was admitted* and in none of them was any doubt thrown upon the correctness of the decision in Langford's case. * * * Here the claimants never authorized the use of the patent right by the Government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. * * * The Government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close where the mind of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort" (pp. 459-460).

On the other hand, Mr Justice Brewer quoted from the opinion in the case of *U. S.* v. *Palmer*, 128 U. S., 262, among other cases referred to by him, where the facts showed a transaction constituting a contract and not a tort, as follows:

> "No tort was committed or is claimed to

> have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands from use and occupation under the lease" (pp. 463-4).

(*c*) That the mere fact that the Government did not claim to *own* the property taken by it, is not in itself sufficient to constitute the taking one as sovereign or to create an implied agreement to pay to the owner the reasonable value of the property, where the circumstances show that the Government did not expect to pay the owner for the property, is established by the recent decision of this Court in the case of *Harley* v. *U. S.*, 198 U. S., 229. In that case the Government used a patent device which it did not claim to own, but the circumstances showed that the Government did not intend to pay the owner and did not expect that he would ask for remuneration, for the reason that he was an employee of the Government. On these facts this Court held that there was (*a*) a mere tortious taking and use of the device, and that (*b*) no suit could be maintained against the Government for such tortious use. The Court said that the fact that there was no meeting of the minds of the parties distinguished the case from *McKeever* v. *United States*, 14 Ct. Cl., 396, and *United States* v. *Lynah*, 188 U. S., 445.

Finally, in the *Buffalo-Pitts* case this Court re-

ferred with approval to and reaffirmed the ruling laid down in the *Harley* case. (*United States* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233.)

(3) From the foregoing analysis of the *Lynah* case and the other cases referred to, it seems clear that the only proposition, for which the *Lynah* case can be said to be authority, is that there is a presumption that the Government takes property as sovereign and impliedly agrees to pay the reasonable value thereof to the owner, when it appears that the Government has appropriated property and (in the language of the *Lynah* case) the Government does not "pretend that it *owned* the property or had a *paramount proprietary right to its possession,*" and the Government does not "*set up any title to the property antagonistic to that claimed by the plaintiffs.*"

It is also clear, that where it appears as it did in the *Harley* case (*supra*), that although the Government admitted that it did not own the property, it claimed or believed that it had the right to use it without paying the owner, the taking must be held to be not upon an implied agreement to pay the owner, but, on the contrary, must be held to be tortious.

(4) The defendant in its brief filed in this Court in opposition to the plaintiff's motion for a writ of *certiorari* cited the case of *United States* v. *Societe Anonyme Des-Anciens Etablissements Cail*, 224 U. S., 309, in which a claim was allowed against the Government for royalties on a patented invention for use on large guns, on the theory that there was an implied contract be-

tween the claimant and the Government. Defendant's brief set forth *verbatim* the letter dated September 3, 1891, from Admiral Ramsay to the Secretary of State, but failed to quote or refer to the letters of the Chief of the Bureau of Ordnance and of the Secretary of the Navy in December, 1894, which this Court said in the opinion in that case superseded the earlier letter and constituted a reversal of the position of the Government with respect to the rights of the claimants, the *Societe Anonyme*. This Court, in its opinion in the *Societe Anonyme* case, expressly stated, referring to the letter of September, 1891:

> "*But the position taken in that letter was, as we have seen, abandoned,* and it was declared that so far as the De Bange patent was valid, its claim for royalties was, in the opinion of the Bureau of Ordnance, a proper one, and would be sustained by the courts. *This was in 1894.* Prior to that time and afterwards the government continued to use the device. We think the court of claims had jurisdiction." (Our italics.)
>
> *United States* v. *Societe Anonyme Des Anciens Etablissements Cail,* 224 U. S., 309, at p. 322.

In the case at bar it is undisputed that the Government deliberately and unequivocally took the position that it had the right to seize the plaintiff's property without payment or compensation to the plaintiff. In the *Societe Anonyme* case, on the contrary, the facts were, as stated by this Court in its opinion:

"The officers of the government knew of

the De Bange invention and were aware of its great importance and the purpose to deliberately take property of *another* without the intention that *he* should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. *On the contrary, the record shows that compensation was contemplated.* There was doubt as to the extent of it, because there was no doubt as to how far the devices used were attributable to or belonged to De Bange, or whether they constituted an infringement of his patent, and *therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it.*" (Our italics.)

United States v. *Societe Anonyme, Etc., Cail,* 224 U. S., 309, at p. 320.

(5) The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*

While the Government did not claim to be the *owner* of the plaintiff's property, it did claim to have the right, *by virtue of its contract with the Hubbard Building & Realty Company and the indebtedness owing by the Hubbard Building & Realty Company to the Government,* to take the property without any payment to the owner, but merely upon *crediting,* upon the indebtedness of the *Hubbard Building & Realty Company* to the Government, the *alleged value* of the property fixed by a Government employee in accordance with the provisions of the Hubbard Building &

Realty Company contract, such amount being $11,578, *which was $3,500 less than the actual and reasonable value of the property as found by the Committee,* which was $15,000. (Findings of Committee, 17, 18, 19, 26, 32, Conclusion 2, fols. 89-93; 97-98, 103-106.)

It is difficult to see how any claim could partake more of a proprietary nature and less of the character of a taking as sovereign. The whole theory of the taking as sovereign is that the Government takes the property not because it has any lien upon it or title to it or contractual claim of any kind, but merely because as sovereign it has use for the property, to which except for the fact of the sovereignty it would have no right.

The situation in the present case, however, is the exact reverse in every respect of a taking as sovereign, and is exactly such a claim as might be made by any individual who had entered into a contract containing the clause in question. It is a claim that the Government—

1.—Was not bound to pay or credit the plaintiff at all;

2.—Was not bound to *pay* the Hubbard Building & Realty Company anything;

3.—Had what amounted to a lien upon the property to enforce payment of indebtedness of the Hubbard Building & Realty Company to the Government; and

4.—Could take the property on giving a credit to the Hubbard Building & Realty Company, not of the *actual or reasonable value,* but merely of

the value *as fixed by an officer of the Government at an amount which was much less than the actual value.*

As a matter of fact, practically all of the authorities cited by the respondent on its original writ of error to the Circuit Court of Appeals, in support of the claim that the Government had the right to take the property of the plaintiff under paragraph 33 of the contract between the Government and the Hubbard Building & Realty Company, and credit the value thereof as fixed by the Government engineer upon the debt owed by the Hubbard Building & Realty Company to the Government, were cases involving building contracts *between private persons.* The claim urged upon the Committee and upon the Circuit Court of Appeals by defendant's counsel was that the Government had the right to take the plaintiff's property upon crediting the Hubbard Company with the value as fixed by the Government engineer, on the theory that the plaintiff had constructive notice of the provisions of the contract between the Government and the Hubbard Building & Realty Company. Such a right would, of course, have been purely of a proprietary nature, such as is ordinarily claimed by private individuals.

It therefore seems clear that the taking of the plaintiff's property was, in the language of the Supreme Court in the *Lynah* case, taking under a claim on the part of the Government of *"title antagonistic to that claimed by the plaintiff's,"* and was also under a claim of *"paramount proprietary right to its possession,"* and was not a taking by the Government as sovereign.

(6) The foregoing was written prior to the decision of this Court in *Tempel* v. *United States* on December 9, 1918. That was a suit to recover the value of property taken by the Government in making a river improvement. The Government did not claim that it *owned* the lands of the claimant, but did claim that it had the *paramount right* to use the same and to make improvements thereon for purposes of navigation without the payment of compensation. This Court said that—

> "the law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded a property right of the plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker act affords no remedy." (Citing the *Hill* and *Schillinger* cases, *supra*, and distinguishing the *Lynah* case and *United States* v. *Cress*, 243 U. S. 316.)

We submit that the reasoning of the opinion of this Court in the *Tempel* case is decisive in our favor of the questions discussed under the present point of this brief.

II.

Since the taking by the Government was tortious, this plaintiff cannot recover the value of its property from the Government.

All of the cases on the subject of a taking by the Government recognize the fact that in some

cases the Government takes the property upon an implied contract to pay for it, and in other cases officers of the Government take property without such an implied contract, *and that in the latter case the taking is tortious.* See quotation from the opinion of Mr. Justice Gray in *Hill* v. *U. S.*, 149 U. S., 593, at page 15 of this brief.

From what has already been said under Point I (*supra*) it seems clear that no agreement on the part of the Government to pay the plaintiff the value of its property can be implied in the present case and that consequently the taking was not as sovereign, but was tortious. In fact, as we read the opinion of the Circuit Court of Appeals on the first writ of error it recognized that the taking was or at least may have been tortious, as it stated:

> "It (the Government) made no proprietary claim, and therefore was bound to pay the real owner for the property *whether the taking was tortious or not.*"

It follows, from the fact that the taking of the plaintiff's property was tortious, that the plaintiff cannot recover from the *Government* the value of the property, either in an action for damages for the tort or in an action on the common counts.

In the decision of the Circuit Court of Appeals for the Second Circuit in *U. S.* v. *Buffalo-Pitts Co.*, 193 Fed. Rep., 905, that Court expressed the view that claims may be prosecuted against the United States under the Tucker Act even if sounding in tort. That Court based its ruling on that point upon certain language which had been used by Mr. Justice Brown in *Dooley* v. *U. S.*, 182 U. S., 222,

and in the concurring opinion written by the same justice in the case of *U. S.* v. *Lynah*, 188 U. S., 445, at p. 475, and upon the alignment of the vote of the justices of this Court in deciding those and other cases.

There apparently was not called to the attention of the Circuit Court of Appeals at the time of the decision in the *Buffalo-Pitts* case, however, the decision of this Court in *Russell* v. *U. S.*, 182 U. S., 516, to the effect that *the Court of Claims did not have jurisdiction under the Tucker Act over obligations arising from tort.* The ruling made in the *Russell* case upon that point was followed in *Harley* v. *U. S.*, 198 U. S., 229, and has been reaffirmed in *U. S.* v. *Buffalo-Pitts Co.*, 234 U. S., 228, at pp. 232-233 and in the recent case of *Tempel* v. *U. S.*

It is therefore established that no recovery can be had against the Government to recover the value of property which has been tortiously taken by an officer of the Government.

The effect of a decision of the Circuit Court of Appeals in the present case, is that the plaintiff is thereby deprived of a recovery against the defendant, the only tort feasor against which it can bring suit for the conversion of its property, and the one which, as between the two (the Government and the defendant), it was agreed should be liable.

III.

No title can be acquired by a tortious taking.

As already pointed out, the decisions of this court on the subject of taking of property by the

Government, all distinguish between a taking by a Government as sovereign and a taking which is tortious. The language of these opinions indicates that a taking which is tortious is not a taking as sovereign, but that, on the contrary, the two classes of takings are mutually exclusive. We have also pointed out that no recovery can be had against the Government for tortious taking.

In addition to these considerations it seems that the Circuit Court of Appeals, in holding that the Government *acquired title to the plaintiff's property,* overlooked the well established rule that no title can be acquired by a tortious taking of property. *Birdsell and Birdsell Mfg. Co.* v. *Gerhart Shallioe and Feikert,* 112 U. S., 485; *Lovejoy* v. *Murray,* 3 Wall, 1.

IV.

The Courts below were correct in holding that the Government had no right to take the property of the plaintiff by virtue of anything contained in the contract between the Government and the Hubbard Building & Realty Company.

As already pointed out, all of the courts before which this litigation has come, are in harmony on the proposition that the plaintiff's rights to its property were not subject to the terms of the contract between the Government and the Hubbard Building & Realty Company and that even if the plaintiff's property had been within its operation,

the terms of the contract could not be construed as authorizing the taking of the plaintiff's property by the Government officials (Committee's Report, fols. 104-107; opinion of District Court, 212 Fed. 1009; opinion of Circuit Court of Appeals, 223 Fed. 618, 139 C. C. A. 164).

The questions presented on this branch of the case narrow themselves to an inquiry, (a) was the plaintiff's property brought within the operation of the contract between the United States and the Hubbard Building & Realty Company; and (assuming for the purpose of argument that the property was brought within the operation of the contract) (b) what was the meaning and effect of the paragraph and (c) did the acts attempted to be done by the Government under it constitute a compliance therewith.

A.

Neither the plaintiff nor its predecessors in title in the ownership of the property in question ever entered into any contractual relation which had the effect of bringing their property within the operation of the Government's contract with the Hubbard Building & Realty Company, and therefore, no matter what construction be placed upon paragraph 33 of that contract it could not affect the plaintiff's title to the property.

The defendant's theory upon the first trial was that by virtue of the provisions of paragraph 33, the Government had the right to take possession of and to acquire title to the plant, machinery and materials belonging to the *plaintiff* by giving credit to the *contractor*, the Hubbard Building & Real-

ty Company, for the value of such property as fixed by the Government officer. The claim is in effect that the Government had the right to take the property of one and pay another. Such a right, if it existed, would be in extreme derogation of the common law rights of the owner of the property and could only rest on the contractual consent of the owner of the property so sought to be taken. It is evident that no property owner will be held to have subjected himself to the loss of his property in such a way unless it clearly appears that he entered into some voluntary agreement by which he released his ownership in his own property to the extent described.

This was the ruling of the Committee who held that Clause 33

> "does not, as a matter of law, authorize the United States to purchase materials, tools, etc., belonging to a third party, in the absence of agreement of the owner to assent to the provisions of paragraph 33." (Fol. 106.)

(a) The defendant, therefore, is confronted at the outset with the fact that the record contains no finding that the plaintiff or its predecessors in title, Ball-Carden Company and Ball, were parties to or ever became parties to the contract in which paragraph 33 is found or that they entered into any contract by which they assented to or agreed to be bound by the provisions of paragraph 33.

It appeared that the Hubbard Building & Realty Company was a Texas corporation which in 1906 entered into a contract with the Government for the construction of Lock and Dam No. 6, and presumably carried on the work under that contract, as work was done under the contract long

before the Ball-Carden Company took any property upon the site (fols. 72-73).

The Committee found that in 1908 the Ball-Carden Company

> "purchased the property enumerated in paragraph 33 of the complaint herein; the great majority thereof was new when placed on the site of said Lock and Dam, and all of said property was purchased with moneys furnished by said P. D. C. Ball; said property was placed by said co-partnership at the site of said Lock and Dam, and was thereafter and until in or about the month of May, 1909, used by said co-partnership in the construction of said Lock and Dam" (Finding of Fact 5, fols. 73-74).

The Government never recognized the Ball-Carden Company in any manner and always dealt solely with the Hubbard Building & Realty Company (fols. 283-284).

The Committee also found that

> "It did not appear under what circumstances either the plaintiff or said P. D. C. Ball, operating under the name of the Ball Engineering Company, undertook to perform said work or furnish said material, nor did it appear under what circumstances said Ball-Carden Company entered upon said work, other than that this was done without the actual knowledge of said P. D. C. Ball, who did not learn thereof until two or three months later" (fol. 86).

There was therefore no privity between the Government and the Ball-Carden Company or the

plaintiff and no contractual obligations existed in favor of either party.

> *United States* v. *Driscoll*, 96 U. S. 421;
> *Baltzer* v. *Raleigh & Augusta R. R.*, 115 U. S. 634;
> *Patton Paint Co.* v. *Llyod*, 156 Fed. 770, C. C. A. (Circuit Court of Appeals Third Circuit).

(b) There is no finding that the terms of the contract between the United States and the Hubbard Building & Realty Company or the provisions of paragraph 33 were known to the Ball-Carden Company or to Ball or Carden at the time the property was placed upon the work, or at any other time until this controversy arose in the spring of 1910. The plaintiff's representative Shanks did not go to Texas until June, 1909, and at that time all of the property involved in the suit was already upon the site of Lock and Dam No. 6.

> "No portion of the property mentioned in the complaint was brought upon the work after the arrival of Mr. Shanks at Lock and Dam No. 6" (Finding of Fact 10, fol. 80).

It does not even appear that after Shanks arrived in Texas in June, 1909, he obtained any knowledge of paragraph 33. While that paragraph was contained in a portion of the written contract with the Hubbard Building & Realty Company headed "Specifications" (fols. 122-164) an examination of the contract as printed in the record will show that the so-called specifications were really merely formal provisions of the adver-

tisement attached to the contract under the heading "General Conditions" (fol. 137, 144) and did not relate to the details of the actual work to be done as do the ordinary specifications of a private building contract.

The Committee in making his findings gave to the defendant the benefit of all the evidence upon the subject of the work done by the Ball-Carden Company upon Lock and Dam No. 6 (Findings of Fact 5-14, fols. 73-86). No finding, however, furnishes the slightest basis for a legal determination that the provisions of paragraph 33 were known to the plaintiff or the plaintiff's assignors when the property was taken upon the work.

The most that can be claimed by the defendant is that the Ball-Carden Company had knowledge that there was in existence a contract between the Government and the Hubbard Building & Realty Company for the construction of Lock and Dam No. 6. Therefore, if the Ball-Carden Company by taking its property upon the work did so at the peril of losing its title thereto, if the contract between the Hubbard Building & Realty Company and the Government so provided, then, every person who undertakes to do work, knowing merely of the existence of a contract between the contractor and the owner of the land, takes his plant and machinery upon the work at the risk of losing it without receiving payment for it.

(c) *The question presented, therefore, is whether the Ball-Carden Company merely by doing work on the Lock and Dam site relinquished its title to its plant, machinery and material in*

use or prepared for use in the transaction of the work.

The argument of the defendant is, as we understand it, that although the Ball-Carden Company may not have had *knowledge of the terms* of the contract, its knowledge that there was a contract gave it *constructive notice* of all of the terms of the contract, including paragraph 33, and that by doing work on the Lock and Dam site it thereby subjected such property as it took upon that site to the terms of the contract. The effect of this claim, if allowed, would be that two contracting parties could, by their own agreement, divest a third person of his property by agreeing, among themselves, that if the third person, knowing of the existence of the contract, but in ignorance of its terms, brought his plant and machinery for use upon the site of work being done under the contract, such property should then become the property of one of the parties to the contract. It is safe to say that the doctrine of constructive notice has never been pressed to this extent by any court.

The doctrine of constructive notice has always been limited by the courts to cases where the facts actually made known were in some way suggestive to a reasonable man of the existence of the other facts of which constructive notice was thus held to be given.

Birdsall v. *Russell*, 29 N. Y., 220, at p. 225.

Johnson v. *Erlandson*, 14 North Dakota, 518; 105 N. W., 722.

In the case at bar, there was nothing in the fact that a contract was in existence between the Government and the Hubbard Building & Realty Company to suggest to the Ball-Carden Company that by the terms of that contract the parties thereto had attempted to provide that the property of third persons who did work upon the Lock and Dam site should, in the event of the annulment of the contract, be subject to be held by the Government without payment or compensation being made therefor, except to the contractor. There would be as much reason for arguing that a carpenter taking his tools upon real estate or into a building occupied by a tenant under a lease from the owner of the land, was bound to inquire into the terms of the lease to see if it contained a provision providing that any personal property of third persons brought upon the premises thereby became the property of the land owner.

It therefore appears not only that there was no contractual relation between the Ball-Carden Company and the Government, but that even if there had been such a contractual relation there was nothing in the circumstances to give to the Ball-Carden Company constructive notice of such an unusual provision as it is claimed the contract contained.

(d) How unreasonable is the defendant's claim, that the owner of plant, machinery and materials who takes it on the site of building operations to use it in doing work, is chargeable at his peril with constructive notice of the terms of a contract between the owner and the contractor, to the effect that property thus brought on the work may be seized by the owner of the land without payment,

except to the contractor, is emphasized by the fact that the defendant has never cited a decision of any court sustaining such a claim. We think it is safe to say that no court has ever permitted the property of a third person to be taken without compensation, under the terms of a contract, to which such third person was not a party and to the terms of which he had not expressly assented and with full knowledge of its contents agreed to be bound.

Only one case has ever been cited by the defendant in which, under any circumstances, the property of a third person was held subject to the terms of a construction contract. *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed., 211. (Circuit Court, District of Oregon, 1909, Wolverton, *D. J.*) The wide distinction between that case and the case at bar is apparent from the fact that the third parties, in that case, Tinker & Scott, had entered into a written agreement with the contractors, Prendergast & Clarkson, to furnish crushed stone and sand for a Government work and to do a portion of that work. This written agreement between the third parties (Tinker & Scott) and the contractors *expressly referred* to the contract between the Government and the contractors and contained provision that in case of the failure from any cause whatever on the part of the third parties to carry out their agreement, *all of their plant, equipment and appliances were to remain on the works* for the use of the contractors *free of cost, until the contract should be* finished; and further provided that the third parties

"should be bound by the plans, *specifications*

> and instructions furnished by the United States Government to Prendergast & Clarkson, the contractors, in their entirety, and with no exception whatever."

The third parties, Tinker & Scott, therefore had express notice of the terms of the contract between the contractors and the Government, and *had agreed in terms to be bound by such contract;* and had further agreed that in case they ceased work their property would remain on the site of the operations until the contract was finished.

Under these circumstances it was not strange that the Court should say, as to a clause contained in the *specifications:*

> "Tinker & Scott are, by their specific agreement with Prendergast & Clarkson, as much bound by this condition as the latter, for it is made a part of their contract" (p. 215).*

In the courts below the defendant cited the *Baker* case (Decisions of the Comptroller of the Treasury, Vol. 15, p. 199) but that case merely held that a clause similar in some respects to the one here involved gave the Govemnment only an option to purchase the property of the contractor and that nothing more was intended than an ordinary purchase and sale. No property belonging to any third person was in any way involved in that case and the controversy arose directly between the Government and the receiver of the contractor who was the owner of the property, the question involved being with

*Judge Wolverton's decision in the Tinker & Scott case also involved other property as to which a recovery was granted against the defendant for conversion upon facts substantially identical with those in the case at bar (See page 216).

respect to the *time* when payment should be made for the property as to which the Government elected to exercise its option of purchase.

Another case which has been cited by the defendant is *Duplan Silk Co.* v. *Spencer,* 115 Fed. 689, in which the controversy arose directly between a private land owner and a trustee in bankruptcy of the contractor. No property of third persons was involved nor was there any claim that the paragraph there in question could be made use of to effect the property of third persons.

The cases and text books referring generally to somewhat similar clauses in building contracts do not contain the slightest intimation that such clauses could be construed, or were intended to deprive third persons of their title to their own machinery and material which they might bring upon the site of operations in doing work thereon.

It is highly unreasonable, therefore, to say that the Ball-Carden Company or the plaintiff could have foreseen or had notice that any claim would be made that they had imperiled their title to their own machinery and material merely by taking it upon the Lock and Dam site and doing work upon the Lock and Dam. In view of the diligent research into this subject, which has evidently been made by defendant's counsel, it is safe to say that the whole history of litigation relative to building contracts does not disclose a single instance of a similar attempt to acquire personal property from its owner under similar circumstances by virtue of any doctrine of constructive notice and in the absence of some express contractual obligation voluntarily entered into with knowledge on the part of the owner of such personal property.

B.

A right to "purchase" plaintiff's property could not be exercised by seizing it and making payment to the Hubbard Building & Realty Company.

Even if it be assumed, for the purpose of argument, that the plaintiff by bringing its property upon the site of the Lock and Dam subjected it to the operation of paragraph 33, nevertheless the Government could not thereby acquire any rights except such as appeared on the face of the paragraph in question, giving the language used a fair and reasonable construction. By its express terms the paragraph only permitted a *purchase* of the property.

The Committee found as a conclusion:

> "5. That said paragraph 33 does not authorize the United States to purchase materials, tools, etc., prepared for use or in use in the prosecution of the work save on payment to the owner thereof at a valuation to be determined by the Engineer Officer in charge" (fol. 107).

The findings show that it was well understood by the defendant at the time it requested the Government to take possession of the property under paragraph 33 that such action on the part of the Government was to be in disregard to the rights of the plaintiff, and that no payment was to be made to plaintiff.* (See Insert E of the Defend-

*The statement in the opinion of the Circuit Court of Appeals on the first writ of error, that Insert E was immaterial because contained in a contract to which the plaintiff was not a party, entirely overlooked the fact that the Government adopted Insert E as its statement to the plaintiff of the terms on which it took the plaintiff's property and expressly notified both the plaintiff and defendant to that effect after the defendant had asked the Government to seize the property under the provisions of that paragraph. (See Defendant's Exhibit 20 at fol. 191, and Defendant's Exhibit 22 at fols. 301-305.)

ant's Exhibit 21, fols. 236-238; Defendant's Exhibits 1 and 2, fols. 286-290.) Under such circumstances, the defendant must stand or fall on what was done by the Government. If the acts of the Government did not constitute a compliance with the contract and a *purchase* of the plaintiff's property, then the Government's act was clearly unauthorized and the defendant's possession and use of the plaintiff's property was clearly wrongful as against the plaintiff.

> *Tinker & Scott* v. *U. S. Fidelity & Guaranty Co.*, 169 Fed. Rep., 211 at page 216.

The language of the paragraph may well be considered in the light of the defendant's claim, that it put the Ball-Carden Company upon notice when it began to work upon Lock and Dam No. 6, that its property could be seized by the Government and payment made to the Hubbard Building & Realty Company. It is evident that the owner of the plant and machinery could, at most, only be held to have notice of provisions which were actually contained in the contract and that provisions by which it is sought thus to deprive him of his own property without payment therefor, should be extremely explicit in the statement of the unusual rights thus conferred.

A provision, to have the effect claimed for this clause should expressly provide that machinery or materials belonging to any one other than the contractor, and brought upon the work, were so brought upon the work under peril of being seized by the Government in the event of the annulment of the contract, *and that in the event of such seizure by the Government payment for such*

property would be made not to the owner thereof but to the contractor.

There is nothing in the language of paragraph 33, however, which would even remotely suggest to the owner of personal property, who examined the contract before taking his property upon the work, that he did so at the peril of its being retained and payment made to the contractor instead of to the owner. The language of paragraph 33 is plain and simple and susceptible of but one construction, namely a right to *purchase* whatever property was included within the operation of the paragraph. Such language, both in common parlance and in technical legal meaning, implies a sale by the owner of the property and the payment of the purchase price to the owner, and affords no possible basis for an inference that it permits the seizure of property of a third person upon payment to the contractor. The most that can be claimed as the effect of the paragraph, is, that the property could be taken by the Government, *under purchase,* at a valuation to be determined by the Engineer Officer in charge; or, in other words, that the Government would have an option to purchase the property by paying *the owner* the valuation as so determined. The word "purchase" implies a payment to the owner of property, and is the antithesis of a seizure or confiscation.

To "purchase" is to buy, to secure or obtain by expenditure of money—to acquire for a valuable consideration, "bought or acquired by paying a price."

Curtiss v. *Burdick,* 48 Vt., 166, 171;
Berger v. *U. S. Steel Co.,* 63 N. J. Eq., 809.

The idea of purchase imparts a sale.

Matter of White Plains Comm'rs, 71 N. Y. App. Div., 544, 549;
Grant v. *Reno*, 114 Mich., 41, 44.

It implies taking full title.

1 Edw. Ch. (N. Y.), 1, 6; 12 Ky. L. R., 216, 221.

Purchaser means a buyer in the ordinary commercial sense.

10 Ch. D., 622, 625.

Paragraph 33 was evidently not inserted for the financial protection or security of the Government. Such financial protection to the Government was provided for by other clauses of the contract with the Hubbard Company. Pararaph 22 of the specifications provided that—

> "The bidder to whom award is made will be required to enter into written contract with the United States with good and true security in an amount of not less than twenty-five per cent. of the amount of the contract, within ten days after being notified of the acceptance of his proposal" (fol. 135).

Paragraph 30 of the specifications provided that—

> "Payments will be made monthly except when otherwise herein specified on estimates of results accomplished during the preceding month. A percentage of ten per centum will be reserved from each payment until the completion of the contract" (fol. 138).

Defendant has also argued from the fact that an assignment of the contract or of any interest

therein was prohibited, that the Government had the right to assume that the various individuals or firms engaged in doing actual work on the Lock and Dam No. 6 were so engaged under the contractor or as its agents or servants.

The provisions prohibiting an assignment of the contract, however, did not create the slightest inference that any machinery or plant in use on the work was owned by the contractor, and the provisions of the contract are wholly inadequate to raise any implication that property brought upon the site of the work to be used by such third persons could be deemed by the Government to be owned by the contractor so as to offset its value against a debt for the purpose of making payment in the event of a purchase under paragraph 33.

The Government was benefited and not injured by the fact that the Ball-Carden Company did work upon Lock and Dam No. 6 and took its plant and materials upon the site. Not only was the progress of the work advanced by the operations of the Ball-Carden Company after the Hubbard Building & Realty Company had practically abandoned the work, but such operations also added to the amount of the reserve percentage held by the Government as security for the completion of the work. That the Government did not consider itself aggrieved and was willing that the plaintiff should dispose of the property appears affirmatively from the fact that when Mr. Ball and the plaintiff claimed the property in March and April, 1910, the Government, through the Chief of Engineers and the United States Engineer Officer in charge, stated in writing that:

"If the owners of the property can come

> to a satisfactory agreement with the contractors who are to complete the work, for the rental of the plant, and the purchase of the materials, it is probable that the United States will not attempt to exercise the right to purchase the property under paragraph 33 of the specifications." (Finding 16, fol. 88; Defendant's Exhibit 18, fol. 284).

Thereafter negotiations were had between the plaintiff and the defendant looking toward the purchase or rental by the defendant of the plaintiff's property, but the parties did not agree on the price (Finding 16, fols. 88-89). The record shows that throughout the entire controversy it was the defendant, and not the Government, which was the moving cause of the seizure of the plaintiff's property.

In conclusion it should be noted that the language of the paragraph does not expressly state in terms that it is intended to apply not only to property belonging to the contractor, but also to property belonging to others. Parties ordinarily attempt by their agreements to affect only their own property and an intention to try to burden the property of others with the obligations of a contract ought not to be presumed in the absence of language which very clearly evidences that intention.

The paragraph, if construed to refer only to the property of the Hubbard Building & Realty Company and merely to give the Government the option of purchasing the property of that Company of the nature described in the pragraph, was a perfectly natural and reasonable provision. If it be sought, however, to extend the purview of the paragraph to the property owned by others than the contractor, the result is little short of absurd.

In any event, however, paragraph 33, as already demonstrated in this point and as expressly held by the Committee, authorizes only a *purchase* of property, requiring payment to the *owner* for any property retained under the provisions of that paragraph. As the Government officer attempted to take the property without paying the owner, his act was not in conformity with the contract even if the property had been within its operation.

C.

The Government in purporting to exercise its alleged rights under paragraph 33, attempted to retain the plant under lease. Since paragraph 33 did not permit the Government to retain property under lease but only to retain it under purchase, such an effort to lease was wholly nugatory and did not vest any title, interest or right to possession in the Government.

The only right given by paragraph 33 was a right to retain the property *under purchase.* Consequently even if title to the property in question had been in the Hubbard Building & Realty Company, so that it could have been purchased by the Government under the terms of paragraph 33 on payment to that company, still the action taken by the officer of the Government in June, 1910, would not have been effective to vest in the Government any title, interest or right to possession at the time of the use of the property by the defendant in the summer and fall of 1910, because such action was (except as to the materials as distinguished from the plant) not a retaining under *purchase* but an attempt to retain under *lease.*

There was no physical act of taking or retention by the Government. The only taking or retaining

was by the sending of the letters of June 6, 1910, and June 22, 1910, from Captain Waldron to the Hubbard Building & Realty Company (Committee's report, findings 17, 18 and 19, fols. 89-93; 291-305.)

The letter of June 6, 1910, to the Hubbard Building & Realty Company (Defendant's Exhibit 22, fols. 291-305) indicates clearly that the Government was not purchasing the plant but only leasing it. In that letter Captain Waldron, after quoting insert E of the specifications of the contract between the Government and J. G. White & Company, the defendant, proceeds:

> "Due to other business which requires my attention for the next two weeks, it will be impossible for me to place a *fair rental value on the items of plant and a fair purchase value on such materials as are used* much before the end of the present month" (fol. 304).

The language used by the Government officer as set forth in Finding 19 of the Report of the Committee, fols. 92-93, is wholly inconsistent with a purchase and the taking of title by the Government, and is quite clearly an attempt to *lease the property (except the material) without a purchase.*

If any doubt remained, however, that the Government was only attempting in June, 1910, to lease the property and not to purchase it, such doubt would be completely dissipated by the letters of November 10, 1910, and January 30, 1911 (Plaintiff's Exhibits D and E, fols. 333-344, made a part of Report of Committee Finding of Fact 27, fols. 98-99).

The action of the Government in crediting the rental of the property to the Hubbard Building & Realty Company is a further confirmation that

the Government was merely seeking to rent the property (see Finding 32, fol. 103).

The position of the defendant was in no respect improved by the fact that in the final account between the Hubbard Building & Realty Company and the Government, almost a year after the defendant began using the property, a credit was given to the Hubbard Building & Realty Company for the value of the plaintiff's property (Findings of Fact 26, 32; fols. 97-98).

Such action in April, 1911, could not, under any possible theory, retroactively change the nature of the Government's alleged possession in the prior summer and fall. *The character of the possession of the Government and the defendant in the summer and fall of 1910 depended solely upon the acts of the Government at the time, and if those acts did not then place the Government in lawful possession, that possession could not thereafter be made lawful by something done in the following March.*

At the time of the conversion, the Government had not *purchased,* but had merely attempted to *lease,* and as it was given no right to lease, its act was on the same basis as if paragraph 33 were not contained in the contract.

It is well settled that any right over property of another, in derogation of the rights of the owner, must be exercised in accordance with the strict language of the grant and the exact nature of the right granted. The only right which the Government could possibly claim was a right to *retain under purchase.* It was given no right to *retain under lease.* Inasmuch as it did not prior to January 30, 1911, see fit to exercise its alleged right to purchase, any possession of the property

under the Government, prior to January 30, 1911, would have been wholly unauthorized even if the Hubbard Company had been the owner.

Colby v. *W. W. Kimball Co.*, 99 Iowa, 321, 68 N. W., 786;
Otis v. *Jones*, 21 Wend., 394;
Goodwyn v. *Goodwyn*, 20 Ga., 600.

When the Government relies for some right on an act done by an agent, it must take the act as it actually exists. That the courts will examine the act of a Government agent to determine its effect, has been frequently held in cases involving the taking of private property by Government agents who either denied the title of the owner, or claimed that the property was Government property. In such cases, as already pointed out in another connection *supra*, it has been held that where an officer of the Government makes use of private property, but denies the title of the owner, or claims some superior title in the United States Government, there is merely a tortious taking by the *agent*, although if the agent had admitted the owner's title, there would have been a taking by the *Government*, for which the Government would have had to pay.

Langford v. *U. S.*, 101 U. S., 341;
Hill v. *U. S.*, 149 U. S., 593;
Schillinger v. *U. S.*, 155 U. S. 163.

Certainly if the Government officer had not taken any action whatever it would not be claimed that the Government had retained the property under purchase. The officer did, as a matter of fact, perform an act, and the question presented under this sub-division is, whether or not that act would have constituted a valid exercise

of the alleged contractual right given in the contract even if the property had been owned by the Hubbard Building & Realty Company. The question thus presented is in no respect different from a similar situation arising between private individuals or corporations.

The Committee found as a conclusion:

> "5. That said paragraph 33 does not authorize the United States to retain materials, tools, etc., whether the property of the contractor or of other parties, upon payment of a rental value to be determined by the Engineer Officer in charge, and the United States did not acquire any title to or right to the possession of said property by virtue of paragraph 33' (fol. 107).

It seems clear that as held by the Committee and the District Court, the attempt to *lease* the property was wholly nugatory, as an attempted exercise of rights under the contract, entirely aside from all questions presented in Subdivisions A and B of the present Point IV.

V.

The decree of the Circuit Court of Appeals and the judgment of the District Court should be reversed and a new trial ordered, or the conclusions and judgment upon the first trial in favor of the plaintiff should be reinstated.

The decision of Judge Wolverton in *Tinker and Scott* v. *U. S. Fidelity and Guaranty Company,*

169 Fed. 211, at page 216 above referred to, sustains the right of the owner of plant and materials located upon the site of Government work, the original contract for which has been annulled, to recover in conversion against a defendant who undertakes the completion of the work and who uses, under an alleged right from the Government officers, the plaintiff's property which the Government officers had seized under a mistaken claim based on a misapprehension of the effect of the Government's contract with the original contractor.

In the case at bar the defendant used the plaintiff's property with clear notice at the time, both from the plaintiff and from the Government, that the plaintiff claimed such use to be unlawful and that the defendant acted at its own risk. The defendant has wholly failed to justify its act and judgment against it now will merely compel it to do what it should have done in 1910, to wit, make payment for the property of the plaintiff which it used.

Respectfully submitted,

HOMER S. CUMMINGS,
Attorney for Plaintiff-in-Error.

CHARLES D. LOCKWOOD,
WILLIAM M. PARKE,
S. L. SWARTS,
Counsel.

SCHEDULE A.

J. G. White & Co. v. *Ball Engineering Co.*, 223 Fed., 618; 139 C. C. A., 164, Circuit Court of Appeals, Second Circuit. April 13, 1915, No. 214.

"Before LACOMBE, WARD, and ROGERS, *Circuit Judges.*

WARD, *Circuit Judge.*

(1) This is a writ of error to a judgment in favor of the plaintiff for damages for conversion by the defendant of certain personal property specified in the complaint used by defendant in constructing Lock and Dam No. 6 on the Trinity River, Tex. The trial was before a referee, called in Connecticut a "committee" and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find. *Andes* v. *Slauson*, 130 U. S. 435, 9 Sup. Ct., 573, 32 L. Ed., 989; *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S., 489, 32 Sup. Ct., 711, 56 L. Ed., 1177, Ann. Cas., 1914B, 699; *Edenborn* v. *Sim*, 206 Fed., 275, 124 C. C. A., 339.

(2) What seems to us to be the material facts found by the committee were substantially as follows:

July 10, 1906, the Hubbard Building & Realty Company entered into a written agreement with

the United States to construct Lock and Dam No. 6 on the Trinity River, Tex.

Some time in the year 1908 a partnership composed of George A. Carden and P. D. C. Ball, trading under the name of the Ball-Carden Company, placed on the site of the lock and dam a considerable amount of property consisting of machinery, tools, and materials and used the same in constructing the lock and dam until the month of May, 1909.

In April or May, 1909, the partnership was dissolved, Carden transferring all his interest to Ball, who continued the work under the name of Ball Engineering Company until on or about September 8, 1909.

September 9, 1909, work on the lock and dam was discontinued, and on October 22d the government, in accordance with its provisions, annulled the contract with the Hubbard Company.

April 2, 1910, the plaintiff, Ball Engineering Company, was incorporated under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

June 6, 1910, the government entered into a written contract with the defendant, J G. White Company, Inc., to complete the work.

The government took the property belonging to the plaintiff at a value of $11,578 fixed by the engineer and credited the amount in account of the Hubbard Company. It professed to act under section 33 of the contract with the Hubbard Company, which reads:

> 'Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use

> by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge.'

This property the government leased to the defendant, who used the same in completing the work and after completion returned all of it to the government except such material as had been used in construction.

As a conclusion of law, the committee found the defendant had as of July 6, 1910, unlawfully converted the property of the plaintiff mentioned in the complaint of the fair market value of $15,000, for which sum with interest at 6 per cent. from that date the plaintiff was entitled to judgment.

The district judge entered judgment in accordance with the report of the committee, and the defendant has taken this writ of error from the same.

We think the committee and the court below correctly held that the government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject

to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no propietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the government was justified in acting as against the plaintiff under the contract with the Hubbard Company. The plaintiff also relies upon a provision in the contract between the defendant and the government to the effect that:

> 'If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or

purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents.'

We regard this provision as quite immaterial. The defendant is making no claim against the government, and the plaintiff is no more concerned with this contract than it was with the contract between the government and the Hubbard Company.

We have considered this general subject in *United States* v. *Buffalo-Pitts Co.*, 193 Fed., 905, 114 C. C. A., 119, affirmed 234 U. S., 228, 34 Sup. Ct., 840, 58 L. Ed., 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

The judgment is reversed."